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In the Supreme Court of the United States

_____TERM, 19_____

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Collector of Revenue for the State of Louisiana, now Ashton J. Mouton, Successor in office to Roland Cocreham, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, in Number 23,402, Mississippi River Fuel Corporation, et al versus Roland Cocreham, Collector of Revenue, State of Louisiana.

OPINIONS BELOW

1.

The application for a rehearing was denied by the United States Court of Appeals for the Fifth Circuit. The majority opinion and the dissenting opinion on the application for a rehearing are not reported. They are appended hereto as Appendix A.

2.

The opinion of the District Court, Eastern District of Louisiana, Baton Rouge Division, which

granted judgment to the petitioner, is reported in 247 F. Supp. 819. The opinion and judgment are appended hereto as Appendix B.

3.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 382 F. 2d 929. The opinion and the judgment are appended hereto as Appendix C.

JURISDICTION

The decree of the United States Court of Appeals for the Fifth Circuit was entered and signed on September 13, 1967. A petition for a rehearing was denied by a three judge panel, with one judge dissenting, on January 8, 1967. An order staying the mandate of the Court for sixty days from January 16, 1968 was signed by Judge John Minor Wisdom, on January 16, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 28 U.S.C. Sec. 1651(a). A writ of certiorari is applied for on three grounds.

1.

The federal courts do not have jurisdiction of the subject as a matter of *federal law*. Jurisdiction in the federal courts cannot be conferred by either the States or by private litigants.

2.

The State of Louisiana has never consented to be divested of its sovereignty over the oil and gas within

its territorial limits and has never relinquished its power to conserve its natural resources lying within its boundaries.

3.

In the alternative, Congress retroceded to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, within federal enclaves.

With reference to one and two above the following statement is added. The collection of millions of dollars in present and future taxes by not only this State but also by other States depends on the decision of this case. The collection of these taxes in no way diminishes the tax collections of the United States because the taxes are on the private operations of private parties who, except for the fact that their operations take place in federal enclaves, would be subject to the tax. Yet the services which the state must provide these individuals and corporations is in no way diminished by the fact that they operate in federal enclaves. Therefore, the question presented by this case, especially with reference to the Buck Act, is of paramount importance and of great interest not only to this State but to all other States in which there are federal enclaves.

QUESTIONS PRESENTED FOR REVIEW

1.

May a State, or may parties to an action confer jurisdiction on the federal courts in matters relating

to State taxes when the aggrieved taxpayer has a complete and adequate remedy in the State Courts?

Title 28, U.S.C.A., Section 1341 states that federal courts do not have jurisdiction in such cases.

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

2.

Is the sovereignty of the State of Louisiana over its oil and gas limited when the severance of the minerals take place in a federal enclave?

The fundamental law of Louisiana oil and gas is that title to such minerals do not pass with title to the lands under which they lie. By operation of law acts of sale or donation by which title to land is passed in Louisiana, whether to the United States or private parties, is subject to this fundamental law. Oil and gas within the territorial limits of Louisiana are Louisiana natural resources and the State, in its Constitution, has retained the sovereign power to conserve those resources and to regulate the severance thereof.

3.

In the alternative, did Congress, by means of the Buck Act, *Title 4, U.S.C.A., Sections 5-10*, retrocede to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, on private businesses operating in federal enclaves? In other

words, did not Congress, by means of the Buck Act, remove the cloak of federal tax immunity from private enterprises which operate in federal enclaves?

STATUTES AND REGULATIONS INVOLVED

The following United States constitutional provision and United States statute are involved.

Article 1, Section 8, Clause 17, United States Constitution.

"The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other Needful Buildings."

Title 28, U.S.C.A., Section 1341

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF FACTS

Respondents are lessees under oil and gas leases from the United States covering portions of Barksdale Air Force Base, Bossier Parish, (County), Louisiana. Respondents are producing oil and gas from

these lands and Petitioner, Collector of Revenue of Louisiana, hereinafter referred to simply as "Collector", is seeking to collect severance taxes on respondents' portion of such production. No taxes are asserted against the United States' portion of the production. The taxes are resisted by respondents on the grounds that the Collector is without legal authority to levy and collect such taxes on production of oil and gas underlying the air base because the United States has exclusive jurisdiction over the base.

Under Louisiana law a taxpayer has two methods whereby he may resist the payment of taxes: (1) he can pay the taxes under protest and sue for their recovery; or (2) he can wait until the tax is assessed and then apply to the Louisiana Board of Tax Appeals for a redetermination of his assessment. This second remedy does not require that the taxpayer pay the tax at that time. The assessed taxpayer may appeal an adverse ruling of the Board of Tax Appeals to the courts. The tax is not paid unless there has been a final judicial determination of the case adverse to the taxpayer.

Respondents chose to pay the taxes under protest as provided by Title 47 Sec. 1576, Louisiana Revised Statutes of 1950. (Appendix D). However, instead of filing suit to recover the taxes paid under protest in the proper state court the suit was filed in the United States Federal Court for the Eastern District of Louisiana, Baton Rouge Division, Baton Rouge, Louisiana.

The lower federal court rendered judgment in

favor of the Collector on the ground that Louisiana had never ceded to the United States the right to tax minerals extracted from Louisiana lands transferred to the United States.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit and while the appeal was pending that Collector filed a motion to have the case dismissed on the ground that the federal court lacked jurisdiction. This motion was ordered to be carried with the case.

The Fifth Circuit reversed the District Court and overruled a previous Fifth Circuit case, *Mississippi River Fuel Corporation v. Fontenot*, 284 F. 2d 898 (1956), Cert. den 352 U.S. 916, 1 L.Ed. 2d 122, 77 S.Ct. 213, which had been previously litigated between the same parties on the same point of law and which had been decided in favor of the Collector. The Fifth Circuit gave as a reason therefor that a later Supreme Court decision, *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct. 857 (1964) had overruled *Fontenot*, supra. Thereupon the Collector timely filed an application for rehearing and a supplement thereto based on the same specifications of error which are stated and reurged in this petition.

Two appellate court judges denied the application for a rehearing. One judge, in a strong dissent, thought the rehearing should be granted, (Appendix A, page 27), on the ground that Louisiana had never ceded its right to tax oil and gas produced from lands transferred to the United States. The dissent also questioned the wisdom of overruling *Fontenot*, supra.

From the time of the filing of this case in November 19, 1963 to date the taxes paid under protest by respondents herein and *Texas Gas Exploration Company v. Collector*, an identical case, and *Shell Oil Co. v. Collector*, a similar case, the plaintiffs of which have appeared as amicus curiae in this case, amount to $3,784,855.00 with accumulated interest, an accumulation of approximately $75,000.00 a month.

ARGUMENT ON QUESTIONS PRESENTED

1.

Argument on Question No. One

Jurisdiction of the federal courts was conceded by the Collector in this District Court. The question of jurisdiction was first raised after the cause had been appealed to the Fifth Circuit. There the Collector did not argue lack of jurisdiction as a matter of federal law but the argument was based on whether or not the state had waived its sovereign immunity under the Eleventh Amendment. The Fifth Circuit ruled that the State had waived its immunity. *That ruling is not now being questioned.*

The question of jurisdiction as a matter of *federal* law was first presented in the Collector's Supplementary Petition for Rehearing which was filed in the Fifth Circuit a few days before the petition for a rehearing was denied. The question was presented to the Court too late because there is no indication in the opinion of the Fifth Circuit denying the rehearing, (Appendix A, page 27), that the court considered the question of lack of jurisdiction as a matter of *federal law.*

The rule in the federal courts relative to the relief of taxpayers who claim that a state tax is being illegally exacted is that the taxpayer must proceed by way of injunction. But prior to 1937 the federal courts would not enjoin the collection of state taxes if there was a plain and adequate remedy in the state law. At that time when a federal court refused to enjoin the collection of a state tax it was considered more a matter of judicial restraint rather than positive federal law. Later this rule was embodied in the Judicial Code. This is shown by the Supreme Court's decision in *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 297, 87 L. Ed. 1407, 63 S.Ct. 1070, (1942).

> "This withholding of extraordinary relief by Courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts (citations). On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (citations) should stay its hand in the public interest when it reasonably appears that private interests will not suffer." (Citations)
>
> * * *
>
> "It is in the public interest that federal courts of equity should exercise their discretionary power

> to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."
>
> * * *
>
> "Congress recognized and gave sanction to this practice of federal equity courts by the Act of August 21, 1937, 50 Stat 738 c 726 enacted as an amendment to Sec. 24 of the Judicial Code, 28 USCA, Sec. 41 (1), 8 FCA title 28, sec. 41 (1). This provides that 'no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.' "

Thus what was formerly a matter of federal practice is now a matter of federal law. Certainly that is the opinion of the Courts of Appeal of two circuits as is shown by the following quotation from *City of Houston v. Standard-Triumph Motor Co.*, 347 F. 2d 194, (5th Cir., 1965), cert. denied 382 U.S. 974, 15 L. Ed. 2d 466, 86 S. Ct. 539. At page 198.

> ". . . Wide as a Court's power must be in the exercise of its discretion whether to grant declaratory relief, the Supreme Court makes clear that 'it is the court's duty to withhold such relief' when, in the words of the Johnson Act, there is "a plain, speedy and efficient remedy . . . in the courts of the state. 319 U.S. at 300-301, 63 S.Ct. at 1074. This is the decision that the Sixth Circuit has twice reached. *Helmsley v. City of Detroit, Mich.*, 6 Cir., 1963, 320 F. 2d 476; *Wyandotte Chemicals Corp. v. City of Wyandotte*, 6 Cir., 1963, 321 F. 2d

927. The critical turning point is the adequacy of the state court remedies. See *Township of Hillsborough, Somerest County, New Jersey v. Cromwell*, 1946, 326 U.S. 620, 66 S. Ct. 445, 90 L.Ed. 358; *Georgia Railroad & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; *George F. Alger & Co. of Detroit, Michigan v. Peck*, S. D. Ohio, 1954, 119 F. Supp. 812, affirmed, 1954, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed. 1120, 1148; *Livingston v. United States*, E.D.S.C., 179 F. Supp. 9, affirmed, 1960, 364 U.S. 281 80 S.Ct. 1611, 4 L.Ed. 2d 1719. Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by the enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available."

Certainly if the above is true with reference to declaratory relief as to state taxes which are contested as being illegal it is also true with reference to injunctive relief from state taxes which are contested as being illegal.

It will now be shown that the respondents herein not only had a plain, speedy and adequate remedy at law in the Louisiana Courts but that the remedy has received the express approval of the United States Supreme Court.

Act 330 of 1938, now Title 47, Sec. 1576, Louisiana Revised Statutes of 1950, (Appendix D, page 79) is the Louisiana statute which provides for payment under protest and for a plain, speedy and efficient

remedy at law for the contest of taxes so paid and claimed to be illegal.

In *Huffman*, supra, the United States Supreme Court had this to say about that Louisiana statute. At 319 U.S. 296, 87 L.Ed. 1410:

> ". . . the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." *And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision.* By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto" shall pay the tax to the appropriate state officer and file suit for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded. (Emphasis Supplied)

In addition to R.S. 47:1576 the State of Louisiana provides an additional procedure for the contest of taxes claimed to be illegal wherein the taxes need not be paid under protest. The statutes on this procedure

are Sections 1431-1438, Title 47, Louisiana Revised Statutes of 1950. (Appendix E, page 81).

Thus Louisiana provides the taxpayer with two plain, speedy and efficient remedies at law. Title 47, Section 1576, Louisiana Revised Statutes of 1950 provides for payment of taxes under protest and suit for recovery. Title 48, Sections 1431-1438, Louisiana Revised Statutes of 1950 requires no payment of taxes at all. When it is made against him the taxpayer simply contests the tax assessment in the Louisiana Board of Tax Appeals. The decision of the Board is subject to judicial review and it is only after an adverse final judgment that the taxpayer is required to pay the tax. Clearly, then, the federal courts have no jurisdiction under Title 28, U.S.C.A. Sec 1341 because Louisiana provides two plain and adequate remedies to the taxpayer who feels that he is being unjustly taxed.

As previously stated the Court of Appeal ruled on the question of jurisdiction from the standpoint of whether or not the State had waived its immunity from suit. This question of jurisdiction from the standpoint of *federal law* was not considered by the Court of Appeal simply because it was not argued by petitioner.

Argument on Question No. Two

We now consider the question: Is the sovereignty of the State of Louisiana over its oil and gas limited when the severance of the minerals take place in a federal area?

Louisiana has always defined oil and gas as a fugitive material which is not susceptible of ownership

until it is reduced to possession. (*Frost-Johnson Lumber Company v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922); *Wright v. Imperial Oil and Gas Products Company*, 177 La. 482, 148 So. 685 (1933); *Ohio Oil Company v. State of Indiana*, 177 U.S. 190, 44 L.Ed. 729, 20 S.Ct. 576 (1900). Oil and gas are contained in certain formations beneath the earth's surface the exact limits of which, with reference to the surface, are never known definitely. Within these formations oil and gas move freely responding only to forces of gravity and pressure. It can and frequently does happen that if a surface land owner does not take steps to protect his interest either by drilling his own wells or by a unitization agreement, that adjacent landowners will drain all oil and gas from beneath his land. When such happens, the oil and gas belongs to the person who reduced it to possession, not the person from under whose lands it was drained. That oil and gas underlying Barksdale Air Force Base might be drained by adjacent landowners was recognized in the leases to plaintiffs by the United States. (R. 87)

Because of the fugitive nature of oil and gas it logically follows that it is never owned until it is reduced to possession and since oil and gas can never be owned until it is reduced to possession it follows that, under Louisiana law, title to oil and gas in place can never be acquired. What a surface owner acquires in Louisiana when he acquires title to land is the right to explore for oil and gas and the right to reduce to possession any oil and gas found. The United States, therefore, acquired no greater right than to explore

for oil and gas beneath the land comprising Barksdale Air Force Base by virtue of Act No. 12 of 1898, and Act No. 31 of 1942 under which acts the land comprising the base was acquired. These two acts were simply authority for the United States to acquire the land, and when the land was acquired by the United States through donation and conveyance the rights of the United States were no greater than those of any other donee or purchaser. There are no Louisiana statutes giving the Federal Government any greater rights as a purchaser or donee than those of any other Louisiana purchaser or donee.

When Louisiana was created as a state it acquired sovereignty over all the lands and minerals within the territorial confines of the State. For the State to be thereafter deprived or limited in its sovereignty over the lands and minerals within its territorial limits it obviously must consent thereto. But it has already been shown that Louisiana ceded neither ownership nor sovereignty to the United States with respect to oil and gas underlying Barksdale Field and in *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 197, 82 L.Ed. 187, 58 St. Ct. 233 (1937), the United States Supreme Court held that acquisition of title to land alone is not sufficient to exclude a State's taxing power within a federal enclave.

> "The acquisition of title is not enough to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuim of jurisdiction which otherwise it would be free to exercise."

The foregoing argument on this question is buttressed by the dissenting opinion of Judge Rives of the Fifth Circuit when the Collector's petition for a rehearing was denied.

The highlights of the dissent are:

1. The State of Louisiana has never consented for the United States to acquire ownership of the oil and gas underlying Barksdale Air Force Base, nor has it given the federal government the unfettered right to reduce to possession oil and gas underneath such lands.

2. *Humble Pipe Line Co. v. Waggonner, supra,* on which the Fifth Circuit based its opinion, decided no more than the question presented by the case, which is, that Louisiana is without jurisdiction to levy an *ad valorem* tax on privately owned property within Barksdale Air Force Base.

3. The majority decision was in conflict with the historic claims asserted by Louisiana in *United States v. Louisiana*, 339 U.S. 699, 702, 94 L.Ed. 1216, 70 S.Ct. 914, (1950). Such claims have never been disputed as to lands lying within the State's boundaries.

4. The State of Louisiana constitutionally reserved the right to levy a charge or tax on its natural resources at the time of their severance from the soil or water.

Judge Rives' dissent so well reasoned and is so well supported by his references and citations that it is reproduced in full in Appendix A at page 27. The Court is asked to consider Judge Rives' dissent as a

part of the argument on this point because to repeat it here would unduly lengthen this brief.

Argument on Question No. Three

In the alternative, the Collector contends that, Congress retroceded to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, within federal enclaves.

Congress and the federal courts have long recognized the problems which arise when two sovereignties, such as our federal system, are operating in the same territory. One of the first problems which arose because of the duality had to do with fugitives who used federal enclaves as sanctuaries. For that reason states have always retained the right and the federal authorities have always recognized that service of process can be made by state officers in federal enclaves and fugitives from states can be apprehended there. The necessity for such an exception to exclusive jurisdiction was recognized early in our federal system because the problem of fugitives has been with us from the infancy of the Republic. What has not been with us until recent years has been the problems created by the immense areas required by the exigences of natural defense, the heavy industrialization of federal enclaves and the greatly expanded acquisition of land by the Federal Government.

Louisiana is a southern state and its climate, terrain and water resources are ideal for the training of soldiers, airmen and seamen. Consequently Louisiana has more than its share of training areas within the

State. In addition, Kitsachie National Forest is located in Louisiana and there are spillways for Louisiana rivers and federal bird sanctuaries in Louisiana's marshlands. All this requires land—plenty of it—and consequently the federal government is the largest landholder in the State. Some of the tracts acquired for these purposes contain as much as a half million acres.

Until recent times the concept of exclusive jurisdiction worked no great hardships on the states. Neither ad valorem nor privilege taxes could be levied where the incidence of taxation took place on federal lands, but the people on those lands were few so no great State expense was required in their behalf. However, with the large influx of servicemen in the military installations and the large number of people who began working in federal enclaves in World War II, serious problems arose. Those problems arose because of the services which must be provided for the families of the military personnel and those people who work, such as schools for their children, sewerage and water service for their homes, police and fire protection, highways and streets and other such services. Yet in most instances those families furnished none of the taxes to provide for such services because a large part of the food they consumed, the gasoline they bought, the personal services they received, the cars they owned and the money they earned were not subject to municipal, parochial or state taxes. The incidence of taxation took place on a federal enclave and under the concept of exclusive jurisdiction no taxes could be levied there.

Congress recognized the inequity of the situation so in Title 4, U.S.C.A. Sections 105-110 it adopted the Buck Act which ceded to the states the right to levy certain *privilege* taxes, as distinguished from *ad valorem* taxes, in federal enclaves. The question then, to be decided in this case is whether or not the Louisiana severance tax is a privilege tax which may be imposed by states in federal enclaves by authority of the Buck Act. The Buck Act and the Louisiana severance tax is now examined with that in view.

4 USCA, Section 106 reads as follows:

> "No person shall be relieved from liability for any income tax levied by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area."

4 USCA, Section 110—contains the following definition:

> "As used in Section 105-109 of this title
>
> * * *
>
> (b) The term 'sales or use tax' means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except

a tax with respect to which the provisions of Section 104 of this title are applicable.

(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term 'state' includes any territory or possession of the United States.

(e) The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any state, shall be deemed to be a Federal area located within such state."

The United States Supreme Court has had occasion to interpret the above two sections. In *Howard v. Commissioners of Louisville*, 344 U.S. 624, 97 L.Ed. 617, 73 S.Ct. 465 (1953), the City of Louisville annexed a naval ordnance plant and surrounding territory. Louisville then levied an occupational tax on employees of the ordnance plant on the value of business done in the city, which included the business done in the federal enclave. The tax was resisted on the basis of two arguments. The first concerned the power and authority of the City of Louisville to annex a territory over which the United States had exclusive jurisdiction. This contention was overruled by the court. The second contention of taxpayer was that the city's occupational tax or license fee was not an "income tax" within the meaning of the Buck Act, and therefore,

jurisdiction to levy such a tax had not been ceded by the United States.

The Court disposed of the above argument by stating that even though the tax in question was not an income tax within the meaning of the laws of Kentucky it was such a tax measured by the definition in the Buck Act. At 344 U.S. 628, 97 L.Ed. 621:

> "Was this tax an 'income tax' within the meaning of the Buck Act? In a prior case, Kentucky had held this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City of Louisville. *Louisville v. Sebree*, 308 Ky 420, 429-431, 214 SW2d 248, 253, 254. But the right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. *The grant was given within the definition of the Buck Act, and this was for any tax measured by net income, gross income, or gross receipts.* In the instant case, the Kentucky Court of Appeals correctly stated that the question was whether the tax was an income tax within the meaning of the federal law. We hold that the tax authorized by this ordinance was an income tax within the meaning of the Buck Act. The City, it is conceded, can levy such a tax within its boundaries outside the federal area. By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area."

The Louisiana Severance Tax is also an income tax within the meaning of the Buck Act. It is measured not in money but by the volume of minerals served.

Article 10, Section 21, of the Louisiana Constitution specifically provides that the measure may be in money or quantity.

> "Such natural resources may be classified for the purpose of taxation and such taxes may be predicted upon either the quantity or value of the products at the time and place of the severance." (emphasis supplied)

By authority of the constitutional provision above quoted, Louisiana originally, by Act 140 of 1922, levied a severance tax on gross market value. Act No. 5 of 1928 changed the basis of the tax to quantity served. Louisiana therefore respectfully submits that the Buck Act which ceded jurisdiction to the states in certain areas of taxation is applicable to the instant case for the reason that the term "gross receipts" as used in the act authorizes a state tax within a federal enclave on entities within the jurisdiction of the state when the tax is a privilege tax and the amount of the tax is measured by the extent the privilege is exercised.

The above argument was made in the Fifth Circuit and in reference thereto that Court stated:

> ". . . the Louisiana severance tax is simply not an income tax. We are not free to expand the technical and precise language that Congress has used."

Perhaps the Fifth Circuit felt that way because it is an inferior appellate court. However, as we understand the *Howard Case, supra,* the United States Supreme Court interprets the Buck Act as Congress' intention to remove the cloak of federal immunity from private enterprises which do business in federal en-

claves. The removal of immunity does not extend to ad valorem taxes as is shown by *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct 857 (1964). However, it does remove the cloak of immunity with respect to any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. It is submitted that the Louisiana severance tax is such a tax.

PRAYER

For the foregoing reasons petitioner prays that a writ of certiorari be granted. The printed record herein, including the proceedings in the Court of Appeals for the Fifth Circuit is enclosed herewith.

Respectfully submitted,
s/ Emmett E. Batson
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CERTIFICATE OF SERVICE

I, EMMETT E. BATSON, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing petition with appendicies on the Solicitor General of the United States and on each of the attorneys of record of the respondents as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Feb. 22, 1968

s/ Emmett E. Batson

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23402

MISSISSIPPI RIVER FUEL CORPORATION, ET AL,
Appellants,

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE
OF THE STATE OF LOUISIANA,
Appellee.

No. 23403

TEXAS GAS EXPLORATION CORPORATION,
Appellant,

v.

ASHTON J. MOUTON, COLLECTOR OF REVENUE
OF THE STATE OF LOUISIANA,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(January 8, 1968.)

ON PETITION FOR REHEARING

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

PER CURIAM: *Humble Pipe Line Co. v. Waggonner*, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782, holds that the United States has exclusive jurisdiction over Barksdale Air Base. The fact that in *Humble* the tax in question was an ad valorem tax on pipelines and equipment and not a severance tax, as in the cases now before the Court, was irrelevant to the decision. Except with the consent of the United States, the State's taxing power cannot operate within the confines of a federal enclave. Here the critical fact is that the incidence of taxation, the reduction of fugitive oil and gas to possession and ownership, takes place within the exclusive jurisdiction of the United States. The severance of the oil and gas is the subject of the tax; not the ownership.

With deference we suggest that the dissenting judge's error lies in the assumption that the State "owned" oil and gas under Barksdale; that the State had "never consented for the United States to acquire ownership of the oil and gas underlying the Barksdale Base". But under Louisiana law, the State, in a proprietary sense, did not "own" the oil and gas. Nor was there any question of the United States' acquiring "ownership" for which the consent of the State might be necessary. Louisiana considers oil and gas fugitive in nature. Like wild animals, these minerals are owned by no one—until they are reduced to pos-

session. What a surface owner acquires in Louisiana when he acquires title to land is a right to explore for oil and gas and reduce these minerals to possession and ownership. These are the rights the United States acquired when the State transferred the land that is now Barksdale Air Base. For the State to have retained an interest in the minerals it would have had to reserve a mineral servitude, that is, a use, or the retention of the right to explore for minerals and to develop the mineral interest. See *Frost-Johnson Lumber Company v. Salling's Heirs*, La. S.Ct. 1922, 150 La. 756, 91 So. 207. See also *Federal Land Bank v. Mulhearn*, 180 La. 627, 157 So. 370; *Rives v. Gulf Refining Company*, 133 La. 178, 62 So. 623; *Dixon v. American Liberty Oil Company*, 226 La. 911, 77 So. 2d 533; *Gueno v. Medlenka*, 238 La. 1081, 117 So. 2d 817.

The argument that in its sovereign capacity Louisiana has the power to impose a tax on the severance of oil and gas in a federal enclave collides with the Supremacy Clause. As *Humble* holds, a State may not legislate for a federal enclave within the exclusive legislative jurisdiction of Congress.

It is therefore ORDERED that the petitions for rehearing filed in the above entitled and numbered causes are hereby DENIED.

Dissenting Opinion

RIVES, Circuit Judge, dissenting:

Upon further consideration, I am convinced that the Legislature of the State of Louisiana has never given "consent" for the acquisition by the United

States of the oil and gas underlying the Barksdale Air Force Base or of the right to reduce that oil and gas to possession free from the State's severance tax.

Only by "consent" of the State could the federal government acquire ownership of the gas and oil or the unfettered right to reduce them to possession. Without the State's consent, the United States has power to purchase or condemn the land for public use. *Kohl, et al. v. United States*, 1875, 91 U.S. 367, 371, 372. In that event, however, its possession is simply that of an ordinary proprietor, and it does not have exclusive jurisdiction or the power to exercise exclusive legislation provided by Art. 1, § 8, cl. 17 of the United States Constitution. *Paul v. United States*, 1963, 371 U.S. 245, 264. *Humble Pipe Line Co. v. Waggonner*, 1964, 376 U.S. 369, held invalid the State's ad valorem tax on pipelines and equipment. It did not decide the question of whether the State's "consent" extended so far as to permit acquisition by the United States of the oil and gas or of the unfettered right to reduce them to possession. The critical question present in this case is the extent of the State's "consent."

The "consent" of the Louisiana Legislature was for the United States to acquire the "land" and to "have the right of exclusive jurisdiction over the property so acquired." La. Acts 1892, No. 12, §§ 1, 2; Acts 1942, No. 31, § 1; La. Rev. Stat. 1950, Tit. 52, § 1. In Louisiana, acquisition of the "land" does not pass title to the oil and gas underneath the surface. In 1930, when this land was acquired by the United States,

that principle was well established. As was said by the learned district judge in the present case:

> "It is too well settled in the law of Louisiana to permit of argument that the oil and gas beneath the soil is not subject to ownership until it has been reduced to possession. See *Frost-Johnson Lumber Company v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922) and cases cited therein. While plaintiff argues strenuously that several cases both before and after *Frost-Johnson* establish the fact that the owner of the land also owns the oil and gas beneath it, its argument is not persuasive. Plaintiff apparently confuses the ownership of the oil and gas with the landowner's right to reduce the oil and gas to possession. This latter right does not confer ownership of the oil and gas prior to its severance from the land."

Mississippi River Fuel Corp. v. Cocreham, E.D. La. 1965, 247 F.Supp. 819, 822.

After discussing each of the cases relied on by plaintiff, the district judge re-stated the same principle of law:

> "In line with these well settled principles of Louisiana law, by which, under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this Court is bound, it is now once again held that ownership of the land itself does not carry with it ownership of the minerals thereunder but merely confers upon the landowner the right to reduce those minerals to possession. In other words, the minerals are not owned until they are reduced to possession." 247 F.Supp. at 823.

The oil and gas were simply not a part of the property "purchased by consent of the legislature of the state" within the meaning of those words as used in Art. 1, § 8, cl. 17 of the Constitution.

The State Constitution, Art. 4, § 12 gave the Legislature and the State agencies and political corporations power to donate the land to the United States. The same Constitution, Art. X, § 21, as pointed out by the district judge (247 F.Supp. at 821), provided for a severance tax on gas and oil as follows:

> " 'Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance; . . . Such natural resources may be classified for the purpose of taxation and such taxes may be predicated upon either the quantity or value of the products at the time and place of severance. No severance tax shall be levied by any Parish or other local subdivision of the State.
>
> " 'No further or additional tax or license shall be levied or imposed upon oil, gas or sulphur leases . . .' "

The severance tax so authorized by the constitution has been levied by the Legislature continuously, both before and since 1930 when the United States acquired the land. La. Acts 1922, No. 40; Acts 1932, No. 72, § 1; Acts 1935, 2nd Ex. Sess., No. 24, § 1; Acts 1940, No. 145; La. Rev. Stat. 1950, Tit. 47, §§ 631-677.

Oil and gas are part of the natural resources of the State of Louisiana from which it derives a large part

of its State revenue. The State has never consented for the United States to acquire ownership of the oil and gas underlying the Barksdale Base, nor has it given the federal government the unfettered right to reduce to possession that oil and gas, nor, a fortiori, oil and gas which may be drained from underneath adjacent lands.

It cannot be disputed that if the Legislature of Louisiana had expressly reserved to the State all rights to and jurisdiction of oil and gas as a part of its natural resources, that reservation would not have operated to deprive the United States of the enjoyment of the land for the purposes for which it was acquired but would have been a valid and effective reservation. *James v. Dravo Contracting Co.*, 1937, 302 U.S. 134, 146. Both the State and the United States dealt with full knowledge of the law of Louisiana. That law with respect to oil and gas in place underneath the surface of the ground, and to the State's right to levy a charge on their severance from the soil resulted in such a reservation just as clearly as if it had been expressed by the Legislature at the time it gave its consent for the United States to acquire the land.

The conduct of the parties seems to recognize that the State did not part with its right to levy a tax on the severance of oil and gas from the soil. The United States acquired the land included in the Barksdale Base by acts or deeds of donation from three donors, viz., the City of Shreveport, the Board of Commissioners of the Bossier Levee District, and the State of Louisiana. Each deed conveyed title to different

parts of the 22,000 acres of land included in the Barksdale Base.

Comparing the descriptions in the respective deeds with the descriptions in the oil and gas leases to the two appellants, it would seem that the oil and gas wells involved in this case are located mostly or entirely on land donated by the City of Shreveport or the Bossier Levee District. Neither of these political subdivisions had the power to donate the State's right to levy a severance tax on gas and oil for, as has been noted, that is a right of the State from which its political subdivisions are specifically excluded by Article X, Sec. 21 of the State Constitution. Further, it is particularly clear that the City of Shreveport had no intention to donate, or attempt to donate, any such right for its Act of Donation was amended before it was accepted by the United States by adding the following reservation: "There is hereby reserved to the grantor herein the royalties that may be produced from the oil and gas leases on said property until June 30, 1932, at which time this reservation shall ipso facto cease and determine." Presumptively, the State's severance tax was being, and continued to be, levied on that oil and gas. There was no effort to terminate the State's right to levy such a severance tax.

The State's Act of Donation was executed pursuant to Act No. 4 of the Legislature of Louisiana for the year 1930, which authorized the lands to be conveyed to the United States for the following purposes: "for an air port, flying field, landing field, military

post and for military purposes." For the State to retain residual jurisdiction over the oil and gas underlying the Barksdale Base would not conflict with the purposes for which the Base was acquired.

Further, the oil and gas leases executed by the United States and by the appellants do not conflict with the State's retained jurisdiction, for each of those leases imposes the duty on the lessee "to pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property, or assets of the lessee."

I have commented on Louisiana's peculiar concepts of oil and gas in place underneath the surface of the ground in two related respects: (1) Acquisition of the land does not pass title to the oil and gas; and (2) Article X, § 21 of Louisiana Constitution declares oil and gas to be "natural resources" upon which the State may levy taxes at the time and place of their severance from the soil or water. It seems to me, however, that, while those peculiarities of the Louisiana law make clear that the State did not part with its right to levy a severance tax, the same result should be reached in any other State when the State consents for the United States to acquire land for purposes foreign to the drilling of oil and gas wells. In such cases, I submit, the State does not consent to any nontaxed exhaustion of its oil and gas reserves.

For the foregoing reasons, it seems clear to me

that the Louisiana law and the intention and conduct of all of the parties involved are in accord to the effect that the United States did not acquire the oil and gas underlying the Barksdale Base, nor did it acquire the right to reduce that oil and gas to possession free from the State's severance tax. It now seems to me that our *decision* in *Mississippi Fuel Corporation v. Fontenot*, 5 Cir. 1956, 234 F.2d 898, was sound and has not been disapproved or overruled by *Humble Pipe Line Co. v. Waggonner*, 1964, 376 U.S. 369. I would therefore grant rehearing in both of these cases and respectfully dissent.

RIVES, Circuit Judge, Addenda to Dissent:

My rambling and lengthy dissenting opinion was directed to a simple denial of the petitions for rehearing. Now by brothers' extended per curiam shows that I have failed clearly to express my views. Hence, at the risk of being tedious, I undertake to state my differences with my brothers' opinion on rehearing.

First, let me compare the opening sentence of the per curiam with the opening sentence of the Supreme Court's opinion in the case cited:

Per Curiam	Supreme Court
"*Humble Pipe Line Co. v. Waggoner*, 1964, 376 U. S. 369, 84 S.Ct. 857, 11 L.Ed. 2d 782, holds that the United States has exclusive jurisdiction over Barksdale Air Base."	"The common question these cases present is whether the United States has *such exclusive jurisdiction* over a 22,000-acre tract of land in Louisiana on which the Barksdale

> Air Force Base is located *that Louisiana is without jurisdiction to levy an ad valorem tax on privately owned property situated on the tract.*"
> (Emphasis added.)

Notwithstanding some broad expressions in the Supreme Court's opinion, it actually decided no more than the question presented. I submit that its *decision* does not conflict with our *decision* in *Mississippi River Fuel Corporation v. Fontenot, supra,* for the reason that Louisiana has never ceded nor relinquished its right to levy a tax or charge on the extraction of oil and gas which constitute a part of the State's natural resources.

Second, my brothers say:

> "Except with the consent of the United States, the State's taxing power cannot operate within the confines of a federal enclave."

With deference, I hold to a different concept of that principle of federalism. In *Silas Mason Co. v. Tax Commission,* 1937, 302 U.S. 186, 197, the Supreme Court, speaking of the claim of the United States that it had acquired exclusive legislative authority which debarred the State from exercising its taxing power within the territory, said:

> "The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum

of jurisdiction which otherwise it would be free to exercise."

Third, according to my brothers, and here I must quote at more length:

> "With deference we suggest that the dissenting judge's error lies in the assumption that the State 'owned' oil and gas under Barksdale; that the State had 'never consented for the United States to acquire ownership of the oil and gas underlying the Barksdale Base'. But under Louisiana law, the State, in a proprietary sense, did not 'own' the oil and gas. Nor was there any question of the United States' acquiring 'ownership' for which the consent of the State might be necessary. Louisiana considers oil and gas fugitive in nature."

I did not say that the State "owned" oil and gas under Barksdale "in a proprietary sense." I heartily agree that "Louisiana considers oil and gas fugitive in nature." Nonetheless, I have some doubt about my brothers' disparagement of the State's ownership of oil and gas. To me it seems to conflict with the historic claims asserted by Louisiana in *United States v. Louisiana*, 1950, 339 U.S. 699, 702:

> "As affirmative defenses Louisiana asserts that she is the holder of fee simple title to all the lands, minerals, and other things in controversy; and that since she was admitted into the Union in 1812, she has exercised continuous, undisturbed and unchallenged sovereignty and possession over the property in question." [1]

[1] See also *United States v. Louisiana*, U.S. No. 9, Original, decided Dec. 4, 1967, 32 L.W. 4032.

I had not before heard those claims disputed as to lands lying within the State's boundaries. With deference to my brothers, I submit that the *State's* ownership of oil and gas is not disputed by the Louisiana Supreme Court in any of the five decisions cited in my brothers' per curiam. None of those cases involved any question of the *State's* ownership. The distinction was made clear in the leading case of *Frost-Johnson Lumber Co. v. Salling's Heirs*, La. 1920, 91 So. 207, 212:

> "The doctrine stated in *Rives v. Gulf Refining Co.*, 133 La. 178, 62 South. 623, that oil and gas beneath the surface of the earth are not subject to *private ownership* was quoted again with approval in *Elder v. Ellerbe*, 135 La. 995, 66 South. 337." (Emphasis added.)

Like doctrines in other states as to the right of property in oil and gas seem also to be confined to *private* ownership.[2]

What my dissent actually did say as to the State's ownership was that: "Oil and gas are part of the natural resources of the State of Louisiana from which it derives a large part of its State revenue."

I adhere to that statement. It finds support in Art. X, §21 of the Louisiana Constitution, and has been clearly recognized by the Louisiana Supreme Court:

> "One of the inherent powers of the State is to conserve her natural resources and to regulate the severance thereof. By constitutional provision, her authority to tax her resources is fixed."

[2]See 24 Am.Jur. Gas & Oil, §§ 3 and 4 and cases cited.

State v. Standard Oil Co. of Louisiana, La. 1937, 178 So. 601, 610.

Fourth, and again I must quote several sentences from my brothers' per curiam:

> "What a surface owner acquires in Louisiana when he acquires title to land is a right to explore for oil and gas and reduce these minerals to possession and ownership. These are the rights the United States acquired when the State transferred the land that is now Barksdale Air Base. For the State to have retained an interest in the minerals it would have had to reserve a mineral servitude, that is, a use, or the retention of the right to explore for minerals and to develop the mineral interest."

With deference, it seems to me the clear answer is to be found in the State's constitutionally reserved right to levy a charge or tax on its natural resources at the time of their severance from the soil or water. Louisiana Constitution, Art. X, § 21.[3] It seems to me that the United States on the one side and the State, City and Levee District on the other side evidence no intention for the State to cede or part with its power to levy a severance tax, and further as to the wells here involved, that the City and the Levee District could not relinquish that power belonging exclusively to the State.

Fifth. Finally my brothers say:

> "The argument that in its sovereign capacity Louisiana has the power to impose a tax on the

[3]Surely the naming of that charge as a severance *tax* cannot change its substance or affect our decision.

severance of oil and gas in a federal enclave collides with the Supremacy Clause."

With deference, I submit that there is no such collision in this case because the State has never ceded or relinquished its power to impose such a tax.

I respectfully adhere to my dissent.

APPENDIX B

(1) Opinion of the District Court

MISSISSIPPI RIVER FUEL CORPORATION

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA.

Civ. A. No. 2898.

United States District Court
E. D. Louisiana,
Baton Rouge Division.
Nov. 30, 1965.

WEST, District Judge:

In this suit plaintiff, Mississippi River Fuel Corporation, challenges the right of the defendant, State of Louisiana, through its Collector of Revenue, to levy and collect a severance tax on oil, gas, or other minerals severed from property located within the State of Louisiana but owned by the United States Government, and on which plaintiff, a private corporation, holds an oil and gas lease. In the year 1930, the United States acquired title from the City of Shreveport, the State of Louisiana, and the Board of Commissioners of Bossier Levee District to some 22,000 acres of land in Bossier Parish, Louisiana. During the years 1930, 1931, and 1932, the United States constructed runways, administration buildings, hospitals, barracks, machine shops, hangars, and other facilities required for the operation of an air base known as Barksdale Air Force Base. Since September 1, 1963, plaintiff,

through its Natural Gas and Oil Division, has been producing oil and gas from certain portions of this property under and by virtue of certain oil and gas leases granted it by the United States on August 1, 1951, and February 1, 1961. Defendant, acting in his capacity as Collector of Revenue for the State of Louisiana, has demanded that plaintiff pay to the State of Louisiana severance taxes on all oil and gas severed from the property in accordance with the provisions of Louisiana's Severance Tax Statute, LSA-R.S. 47:-631 et seq. The defendant contends that severance taxes in the amount of $55,071.40 are due and owing for the month of September, 1963, and that additional severance taxes are due and owing for each month thereafter, the amount thereof to be figured by the quantity of gas and/or oil severed from the land as provided for by said statutes.

Plaintiff argues that the State of Louisiana is without authority to levy or collect this tax for the reason that exclusive jurisdiction over these lands from which the oil and gas is being produced has been lawfully acquired and is being exercised by the United States of America, and that any attempt on the part of the State of Louisiana to levy or collect these taxes constitutes an unlawful intrusion on the exclusive jurisdiction thus vested in the United States of America.

It is agreed by all parties that the State of Louisiana has made no effort to levy or collect severance taxes on the royalty interest of the United States in the oil and gas severed under these leases. The State

is attempting only to levy and collect severance taxes on the oil and gas severed for the account of plaintiff.

This matter was argued to the Court, briefs were filed, and the matter submitted on the above stipulated facts. The only question before this Court is whether or not, when the United States acquired title to the land in question, it acquired such "exclusive jurisdiction" over the property as to preclude the State of Louisiana from levying and collecting a severance tax on oil and gas severed therefrom by a third party producing the oil and gas pursuant to a lease acquired from the United States. This Court concludes, for the following reasons, that the State of Louisiana does have the right to collect these taxes from the plaintiff, and that to do so in no way infringes upon the "exclusive jurisdiction" of the United States over the land in question.

The defendant readily concedes that the United States has exclusive jurisdiction over the land comprising Barksdale Air Force Base, but it does not agree that this exclusive jurisdiction extends to the oil and gas actually produced and severed from the land and thus reduced to possession and ownership by one other than the United States of America. It must be borne in mind that the State of Louisiana has not attempted to assess an ad valorem tax against the land owned by the United States, nor has it in any way attempted to assess a severance tax or any other form of tax against the United States. It clearly could not legally do this, and it has not attempted to do so. The only tax it has levied is a severance tax against the plaintiff, a private corporation, producing oil and gas under a lease which

it happened to have acquired from the United States. The tax in question is assessed pursuant to the provisions of Article X, Section 21, of the Louisiana Constitution of 1921; LSA-R.S. 47:631; and LSA-R.S. 47:-634. Article X, Section 21, of the Louisiana Constitution of 1921, provides, in pertinent part, as follows:

> "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance; . . . Such natural resources may be classified for the purpose of taxation and such taxes may be predicated upon either the quantity or value of the products at the time and place of severance. No severance tax shall be levied by any Parish or other local subdivision of the State.
>
> "No further or additional tax or license shall be levied or imposed upon oil, gas or sulphur leases . . ." LSA-R.S. 47:631 provides:
>
> "Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including . . . minerals such as oil, gas, . . ." LSA-R.S. 47:634 provides:
>
> ". . . (3) 'Severed' means the point at which the natural resources are severed from the surface of the earth or water."

No one here in any way questions the right of the State of Louisiana generally to levy and collect severance taxes pursuant to the above mentioned provisions of law. The question presented is whether or not, by virtue of the "exclusive jurisdiction" acquired by the United States over the land from which the oil

and gas is severed, the State has lost its taxing authority not only as it pertains to the land involved but also as it pertains to the oil and gas severed therefrom.

It is too well settled in the law of Louisiana to permit of argument that the oil and gas beneath the soil is not subject to ownership until it has been reduced to possession. See *Frost-Johnson Lumber Company v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922) and cases cited therein. While plaintiff argues strenuously that several cases both before and after *Frost-Johnson* establish the fact that the owner of the land also owns the oil and gas beneath it, its argument is not persuasive. Plaintiff apparently confuses the ownership of the oil and gas with the landowner's right to reduce the oil and gas to possession. This latter right does not confer ownership of the oil and gas prior to its severance from the land.

Plaintiff quotes from the case of *Rives v. Gulf Refining Co.*, 133 La. 178, 62 So. 623 (1913), wherein the Supreme Court of the State of Louisiana stated:

> "Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground outside of an artificial receptacle at least, as the casing of a well or a pipe line, they must be treated as a part of the realty underneath the surface where they lie. The owner of the surface is the owner of the oil and gas beneath it; but, if they escape into the land of another, he ceases to be the owner of them."

But plaintiff fails to quote what follows in that opinion, wherein the Court said:

> "It has been said repeatedly by the courts and writers that the owner of the soil owns the gas and oil beneath its surface; and expressions to this effect will be found in Thornton's work on the Law Relating to Oil and Gas. This is an acknowledgment of the absolute ownership of the gas and oil beneath the surface by the owner of the land. But, under the Indiana decisions, which have met with the approval of the Supreme Court of the United States, the owner of the land has only a qualified right to the oil and gas beneath the surface—the rights to reduce it to possession and to exclude all others exercising the right on the premises—and title in him to it does not vest until he has reduced it to actual possession, either by bringing it into a well or into a pipe line, or into a tank or other receptacle in case of oil. Until that has happened the gas or oil by natural forces may escape from his land, and be reduced to possession by another, and become his property."

The Court then quoted, with approval, from the case of *Heller v. Dailey*, 28 Ind. App. 555, 63 N.E. 490, as follows:

> "The owner of land is not, by virtue of his proprietorship thereof, the absolute owner of the oil and gas in and under it in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through, or under his land (as making of wells) necessary to reduce the minerals to his possession, and, by thus acquiring the exclusive control to become the owner of the mineral substances as his personal property, . . ."

Strother v. Mangham, 138 La. 437, 70 So. 426 (1915), also cited by plaintiff, and also being a case decided before *Frost-Johnson*, does not stand for the proposition that the owner of the land owns the minerals beneath it, but merely holds that the surface owner has the right to reduce the minerals to possession. Plaintiff further relies on such cases as *Federal Land Bank of New Orleans v. Mulhern*, 180 La. 627, 157 So. 370 (1934); *Gliptis v. Fifteen Oil Company*, 204 La. 896, 16 So.2d 471 (1944); *Dixon v. American Liberty Oil Company*, 226 La. 911, So.2d 533 (1954); *Gueno v. Medlenka*, 238 La. 1081, 117 So.2d 817 (1960); *United States v. Looney*, 29 F. 2d 884 (CA5, 1929); and *Buras v. Timolat*, 275 F.2d 797 (CA5, 1960). But none of these cases support the plaintiff's position. In the *Mulhern* case, decided subsequent to *Frost-Johnson*, the Court, on rehearing, said:

> "A rehearing was granted in this case because defendants contended that the opinion contained language which was in conflict with the well established jurisprudence of the state announced in . . . *Frost-Johnson* . . . , to the effect that natural gas beneath the soil is the property of no person and does not become the property of any one until it is reduced to possession. It was not the intention of the court to change or modify this well-recognized rule of law."

In *Gliptis*, the Court said:

> "Plaintiff does not own the fugitive minerals, such as oil and gas, which are in, or which may pass through, the earth underneath the surface of the

small area allotted to it by defendant for the drilling of a well.

In *Dixon* the Court said:

> "It is true, of course, that the possession of the surface of the land does not of itself constitute possession of the minerals lying thereunder as minerals can only be possessed when they are severed from the soil."

The United States Court of Appeals for the Fifth Circuit in *Looney*, also followed this line of reasoning by holding that a royalty was not income until it had accrued. Finally, in the *Buras* case, while the Fifth Circuit Court of Appeals did say "We do not interpret any of the statutes or decisions placed before us as casting any doubt upon the postulate that perfect ownership of land includes the minerals in it," it cited none of the important cases in this area, and the Court finally concluded:

> "What we have said is in justification of our holding that, under the cases cited, the district court should not have dismissed the action for failure to state a claim. We express no opinion as to what the holding of the trial court should be after it has, under such amended pleadings as the parties may elect to file, proceeded by appropriate means to discover the facts and apply the Louisiana laws to them."

Thus, this case cannot stand for the proposition here advanced by plaintiff.

In line with these well settled principles of Louisiana law, by which, under *Erie R. Co. v. Tompkins*,

304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this Court is bound, it is now once again held that ownership of the land itself does not carry with it ownership of the minerals thereunder but merely confers upon the landowner the right to reduce those minerals to possession. In other words, the minerals are not owned until they are reduced to possession.

Act 31 of the 1942 Louisiana Legislature, pursuant to which the lands in question were ceded to the United States provided:

> "That the United States may enter upon and occupy any land in the State of Louisiana which it has heretofore acquired, or may hereafter acquire, by purchase, condemnation, lease or otherwise, required for sites for forts, magazines, arsenals, dockyards, and other needful buildings, or for any other purposes of the Government of the United States, and shall have the right of exclusive jurisdiction over the property so acquired, during the time that the United States shall be or remain the owner or lessee thereof, for all purposes, except that the State retains the right to serve therein all civil and criminal process issuing under authority of the said State, and all lands so held and title to which is vested in the United States shall be and remain exempt from all state, parochial, municipal or other taxation, assessment or other charges which may be levied or imposed by or under authority of this State."

This statute provided that all *lands* so held by the United States would be exempt from taxation by the State. It did not provide that minerals, which became the property of others by extraction from the soil would

also be exempt from a tax such as the severance tax here imposed. To paraphrase the Court's holding in *Howard v. Commissioner of Sinking Fund of City of Louisville*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953), when the United States, with the consent of Louisiana, acquired the property upon which the air base is located, the property did not cease to be a part of Louisiana. The geographical structure of Louisiana remained the same . . . a state may conform its municipal structure to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. As pointed out by the United States Supreme Court in *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596 (1940):

> "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. . . . Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current. Consequently as defects become apparent legislation is enacted covering certain phases."

At the time this property was transferred to the United States in 1930, the principal of non-ownership

of the minerals beneath the land was well established in Louisiana. See *Frost-Johnson, supra*, decided in 1922. The State of Louisiana, long before the United States Government's acquisition of this property, had, by appropriate legislation, been given the right to impose a severance tax on oil and gas severed from the land. Since the right of the State of Louisiana to tax these minerals when they are extracted from the earth and reduced to possession by someone other than the United States has never been abrogated, that right still exists. It is only the land or other property owned by the United States that is exempt from taxation by the state. It is well settled that the Louisiana severance tax is not a property tax. It is an excise tax upon the privilege of severing. It is not even a tax upon the ownership of oil and gas, but is an excise tax imposed upon the right to sever or produce the oil and gas. *Gulf Refining Co. of Louisiana v. McFarland*, 154 La. 251, 97 So. 433 (1923). Since the oil and gas was never owned by the United States, but was subject only to ownership by plaintiff upon its severance from the earth, and since the plaintiff had the exclusive right, as granted by its lease agreement with the United States to sever the oil and gas from this property, and since the plaintiff, a private corporation, has no sovereign immunity from taxation by the State of Louisiana, it follows that the State has every right to levy and collect this severance tax from the plaintiff herein. The imposition of such a tax in no way interferes with the exclusive jurisdiction of the United States over the land acquired by it from the State of Louisiana.

If there is any question remaining as to the right of the State of Louisiana to levy and collect this severance tax from this plaintiff, it has been resolved clearly and concisely against the plaintiff by the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Mississippi River Fuel Corp. v. Fontenot*, 234 F.2d 898 (1956), cert. den. 352 U. S. 916, 77 S.Ct. 213, 1 L.Ed.2d 122, a case involving the same parties as here involved and involving the same issues as here involved except that they pertained to severance taxes levied prior to 1956. The Court held adversely to the plaintiff in that case, its decision being clear and to the point. In the course of its opinion the Court said:

> "Appellants stating by way of preface: that they are not seeking to avoid the payment of the taxes because they are the lessees of the United States or because of any relationship, contractual or otherwise, with the Federal Government; and that they do not in any way question or seek to limit the scope of the principle denying to persons dealing with the government immunity from state taxation; vigorously insist that the United States has exclusive jurisdiction over Barksdale Field and confidently invoke, as applicable here, the settled principle that a state may not exercise any legislative authority, including its taxing power in relation to property and activities of individuals and corporations within the territory where the United States has such jurisdiction.
>
> "Insisting that what and all that is presented here is a conflict in jurisdiction between the State of Louisiana on the one hand and the United States

on the other over Barksdale Airforce Base, one of the largest military installations in the nation, appellants' argument proceeds thus:

> " 'The primary question in these suits, therefore, is whether the United States is vested with exclusive jurisdiction over Barksdale Air Force Base, the area from which minerals are being produced, and the area on which gas is gathered. If such jurisdiction is vested in the United States, then the taxes claimed cannot be collected for it is axiomatic that the taxing power of a state is limited to persons within, and subject to, such state's jurisdiction: . . .'
>
> * * *

"Whatever may be said of the abstract correctness of appellants' contentions, we think it quite clear that, as applied to this case they are all based upon the wholly incorrect assumption that the severance taxes in question represent an attempt on the part of the State of Louisiana to exercise legislative and executive jurisdiction over the lands in question by levying and collecting taxes upon property of the United States contrary to the provision of Act No. 12 of 1892, LSA-R.S. 52:1: . . .

"It thus appears that the object and purpose of the general severance tax and its effect is not to levy a tax upon the lands included in the base or upon the oil or gas while a part of the base. The tax is expressly made to apply not while the oil or gas is in the earth but when it is severed from its surface, and then it obliges the person severing to file a statement of his business and to pay the tax. In Louisiana, as is well known, there is no ownership of oil and gas in place, and neither in

theory nor in fact is the tax here in question imposed upon it while it is a part of the soil or ground. Only after it reaches and is severed from the surface and becomes personal property does the tax fall upon the severer.

"Putting to one side all the refinements which have attended the long struggles over jurisdiction, as instanced in the cases, and over the effort to throw over private operations the protective mantle of governmental immunity, all that is presented for decision in this case is whether a severer of oil and gas, who, if he had taken it from any other land in the state, would unquestionably be liable under the general laws of the state for the severance tax, can carve out of the fact, that it came from land which was a part of Barksdale Field, an exemption for himself against having to pay the tax on severing the oil and gas from the surface and appropriating it to his own use. For the same reason that the statute under which the exaction is made is a general excise statute, not directed at any particular person or property but at all persons who are severers, it cannot be said that the provision in the lease obliging the lessees, as one of the considerations for it, to pay the taxes, was not fully effective.

"In short, the provision must and will be construed so as to give it effect and as saying in effect that if, under the general laws of the state, the operator would be liable, he cannot draw around himself a cloak of immunity because the United States is lessor, but must, as a part of the consideration for the lease and his obligation under the statute, pay the taxes which the severance tax statutes impose. . . ."

That case also completely disposed of the plaintiffs' claim that the statute under which the severance tax was imposed is in violation of the United States Constitution. This holding could, and probably should have been held to have been res judicata to the present claim, but out of an abundance of caution, the Court allowed the entire matter to be here presented once again.

Plaintiff argues that the later case of *Humble Pipeline Co. v. Waggoner*, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782 (1964), has the effect of overruling *Mississippi Fuel Corp. v. Fontenot, supra.* This contention is wholly without merit. The *Humble* case deals with the question of the right of the state to levy an ad valorem tax on a portion of the property located within the Barksdale Air Force Base. It has nothing whatsoever to do with the right of the State of Louisiana to levy and collect a severance tax on minerals extracted from the earth. The plaintiff argues that there is no distinction between an ad valorem tax and a severance tax. This argument also is without merit. See *Gulf Refining Co. of Louisiana v. McFarland, supra.*

For these reasons, it is concluded that the State of Louisiana, through its Collector of Revenue, does have the right to levy against and collect from the plaintiff herein the severance taxes in question, and therefore, judgment will be rendered herein rejecting the demands of the plaintiff and dismissing this suit at plaintiff's cost.

(2) Judgment of the District Court

(Title and Number Omitted)

(Filed: December 3, 1965)

This cause came before the Court, Honorable E. Gordon West, District Judge, for determination on the record, and the Court having duly considered same and for the written reasons assigned and filed herein:

IT IS ORDERED AND ADJUDGED that the demands of plaintiff be, and they are hereby, rejected and that the matter be, and it is hereby, DISMISSED on the merits at plaintiff's costs.

Baton Rouge, Louisiana, December 3, 1965.

A. DALLAM O'BRIEN, JR., CLERK

By s/ C. H. BANTA

Deputy Clerk

/s/EGW

APPENDIX C

(1) Opinion of the Court of Appeal

MISSISSIPPI RIVER FUEL CORPORATION ET AL.,
Appellants,

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Appellee.

No. 23402.

United States Court of Appeals
Fifth Circuit.

September 13, 1967.

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

WISDOM, Circuit Judge:

The substantive issue for decision is the right of the State of Louisiana to exact severance taxes on oil and gas produced under a lease to a private corporation when the land in question is part of a federal enclave, Barksdale Air Force Base in Bossier Parish, Louisiana. The district court held that the State may exact such taxes. 247 F. Supp. 819. We reverse. When the United States acquired title to the land, it acquired "exclusive jurisdiction" over the property, precluding the State's levying and collecting a tax on oil and gas severed from the land by a third party under a lease from the United States. Article I, Section 8, Clause 17, United States Constitution; *Humble Pipe Line Co. v. Waggonner*, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782.

In 1930, the United States, with the consent of the Louisiana legislature,[1] acquired from the state the 22,000 acres that comprise the Barksdale base. The defendant, in his capacity as Collector of Revenue, collected the Louisiana severance tax on oil and gas that the Mississippi River Fuel Corporation produced at Barksdale during September, 1963. The Company paid the tax under protest and brought this action in the United States District Court for the Eastern District of Louisiana to recover the amount so paid.[2]

Before reaching the substantive issue, however, we must decide whether the Eleventh Amendment withdraws jurisdiction over this suit from the federal courts.

I.

[1] Under the Eleventh Amendment, private litigants may not sue a state in federal court without the state's consent.[3] *Smith v. Reeves*, 1900, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140; *Hans v. State of Louisiana*, 1890, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.

[2, 3] A. In the district court, the Collector conceded jurisdiction and defended the case on the merits, but now he urges that this suit is one against the State of Louisiana and that Louisiana has not consented to

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[1]See Act 4 of 1930; Act 12 of 1892, subsequently amended by Act 31 of 1942 and LSA-R.S. 52:1.

[2]The Company also paid subsequent severance taxes under protest. The parties have agreed to abide by this court's decision with regard to all such taxes subsequently paid.

[3]The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

be sued in a federal court. The Collector may question this court's jurisdiction on the basis of the Eleventh Amendment although he did not raise the issue below. *Ford Motor Co. v. Treasury Dep't*, 1945, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389. Moreover, the Collector's failure to challenge the district court's jurisdiction cannot itself constitute the requisite consent of the state; it is conceded that the Collector has no authority to waive the state's immunity from suit.

B. The Company contends that this suit has been brought against the Collector as an individual and not against the State of Louisiana. Cf. *Atchison, T. & S. F. Ry. v. O'Connor*, 1912, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436. It also contends that Louisiana has consented to be sued for tax refunds in the federal courts. Since we find the latter contention dispositive of the issue, we do not decide whether this suit could be maintained against the Collector as an individual.

Act 330 of 1938, LSA-R.S. 47:1576, provides that persons wishing to contest the legality of state taxes paid under protest shall have "a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter . . ." [4] At the

[4]The portions of Act 330 that are relevant to this case read:

"AN ACT—To carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him.

"Section 1. Be it enacted by the Legislature of Louisiana, That no court of this State shall issue any process whatsoever to restrain the collection of any tax imposed by the State of Louisiana, or by any political subdivision of the State of Louisiana, under authority granted to it by the Legislature or by the Constitution.

time the legislature enacted this statute, Article III, Section 35, of the Louisiana Constitution limited the legislature's power to waive the state's immunity from suit in two ways. It required the legislature to "provide a method of procedure and [to specify] the effect of judgments which may be rendered" whenever the legislature authorizes a suit against the state. In 1946 and again in 1960, however, Article III, Section 35, was amended. The question is whether the 1946 and 1960 amendments withdrew the consent to suit in federal court that Act 330 had previously granted.

"Section 2. (a) A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the officer designated by law for the collection of said tax and shall give the officer notice, at the time, of his intention to file suit for the recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the officer designated by law for the collection of the tax for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the officer designated by law for the collection of the tax shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the officer designated by law for the collection of said tax to the date of refund.

"(b) This Section shall afford a legal remedy and right of action in any State or federal court having jurisdiction of the parties and subject-matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Act, as to the legality of any tax accrued or accruing or the method of enforcement thereof.

* * *

"(c) This Section shall be construed to provide a legal remedy in the State or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States . . ."

The present version of Article III, Section 35, provides that suits "authorized under this constitutional provision" shall be instituted only in Louisiana state courts.[5] In answer to the contention that this provision prevents the federal courts from hearing tax refund suits, the Company argues that suits brought under Act 330 are independent of Article III, Section 35. The Company's contention derives support from the explicit exemption of taxpayers' suits from legislation designed to implement the constitutional provision. Act 27 of 1960. Moreover, federal courts have accepted jurisdiction of tax refund suits under Act 330 in cases that arose after the 1946 amendment,[6] the first law to include language restricting suits against the state to Louisiana courts.[7] And in 1959 the Louisiana Supreme Court declared that such suits may be brought in federal courts.[8] In none of these cases, however, was the issue of federal jurisdiction raised; the parties simply

[5]The relevant portions of Article III, Section 35, as amended in 1960, provide:

> "The Legislature is empowered to waive . . . the immunity from suit and from liability of the state . . .; and each authorization by the Legislature for suit against the state . . . , heretofore and hereafter enacted or granted, shall be construed to be and shall be effective and valid for all purposes, as of and from the date thereof, as a waiver of the defendant's immunity both from suit and from liability. . . . No judgment against the state . . . shall be exigible, payable or paid except out of funds appropriated for payment thereof. . . . No suit authorized under this constitutional provision shall be instituted in any court other than a Louisiana State court. . . ."

[6]E. g., *Mississippi River Fuel Corp. v. Fontenot*, 5 Cir., 1956, 234 F.2d 898; *Superior Oil Co. v. Fontenot*, 5 Cir., 1954, 213 F.2d 565.

[7]The 1946 amendment restricted the state's consent to be sued in a federal court at least as fully as the 1960 amendment. The 1960 amendment explicitly limits to state courts only suits "authorized under this constitutional provision," but the 1946 amendment, literally read, so limited all suits against the state.

[8]*Willis v. Flournoy*, 1959, 236 La. 983, 109 So.2d 490, 495.

assumed that restrictions in Article III, Section 35, had no effect on Act 330. The legislature acted on a similar assumption in 1950 when it incorporated Act 330 in full in the Louisiana Revised Statutes.[1] The revision corrects incongruities and excludes obsolete laws. Act 42 of 1942. See also "Report to Accompany the 'Projet of Louisiana Revised Statutes of 1950' ", 1 LSA p. 5.

The amended version of Article III, Section 35, if applicable to tax refund suits, would not only withdraw Louisiana's consent to suit in a federal court; it would also affect the procedure for satisfaction of a judgment in favor of a taxpayer. Act 330 requires the Collector to segregate taxes paid under protest and repay them, with interest, if the taxpayer prevails in a suit for a refund; Article III, Section 35, forbids satisfaction of any judgment against the state except by a legislative appropriation made subsequent to the judgment. Although the present case does not directly involve the procedure for satisfaction of taxpayers' judgments, this second conflict sheds light on the basic issue whether the amendments of 1946 and 1960 should be read to alter Act 330.

If Article III, Section 35, applied to suits to recover taxes unlawfully assessed, legislative appropriations would not be necessary to satisfy judgments in favor of taxpayers successfully challenging a Louisiana tax. Before Act 330, the Louisiana statute relating to reimbursement of unconstitutional taxes paid under protest required such appropriations. Act 16 of 1934, amended by Act 23 of 1935. Because this requirement deprived protesting taxpayers of an adequate remedy

at law, a federal court in *Texas Co. v. Wilkinson*, E.D. La., 1937, 21 F.Supp. 771, issued an interlocutory injunction against the collection of a Louisiana tax. The legislature promptly enacted Act 330 to avoid the result in *Wilkinson*. See *A. Sulka & Co. v. City of New Orleans*, 1945, 208 La. 585, 23 So.2d 224.

[4] Act 330 forbids Louisiana courts from enjoining the collection of state taxes, and no subsequent legislation, including the constitutional amendments of 1946 and 1960, is inconsistent with this provision. If the amendments to Article III, Section 35, do not affect Act 330, federal courts are similarly powerless to enjoin state taxes, because Act 330 gives the taxpayer an adequate state remedy.[9] If, however, the amendments apply to taxpayers' suits, they have restored the defect that Act 330 was designed to cure and have made federal courts again available to enjoin the collection of unconstitutional taxes. The taxpayer may seek an injunction even though the amendments also repeal the state's consent to be sued in a federal court; it is settled that a suit to enjoin the collection of unconstitutional taxes is an action against the tax collector as an individual and not against the state. *Georgia R. R. & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; see *Ex parte Young*, 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714.

[5] The Louisiana Constitution instructs the legislature to "provide against the issuance of process to

[9] 28 U.S.C.A. § 1341 provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

restrain the collection of any tax and [to provide] for the prompt recovery by every taxpayer of any illegal tax paid by him." [10] This constitutional provision was left intact in 1946 and 1960. In the face of this constitutional policy against actions to enjoin the collection of taxes, we cannot believe that the draftsmen of the 1946 and 1960 amendments intended to return to the situation antedating Act 330. Instead, we hold that taxpayers' suits are not subject to Article III, Section 35.[11]

[6] The Collector asserts that Article III, Section 35, is the only section of the Louisiana Constitution that authorizes the legislature to waive the state's immunity from suit. Therefore, he says, the restriction to state courts of all suits "authorized under this constitutional provision" necessarily applies to the waiver of immunity in Act 330. This argument rests on the hypothesis that the legislature is powerless to waive the state's immunity from suit in the absence of an affirmative constitutional authorization. Since the state's immunity does not derive from the Louisiana Constitu-

[10] Article X, Section 18.

[11] The history of the 1946 and 1960 amendments does not conflict with the result we reach; the parties agree that the principal purpose of both amendments related to non-tax claims against the state.

The original version of Article III, Section 35, required the legislature to specify the effect of any judgment subsequently rendered at the time it authorized a suit against the state. This provision proved unworkable because it compelled the state "to sign a blank check at the time suit was authorized, without knowing either the amount or the date it would be payable." The legislature suggested the 1946 amendment primarily as a remedy for this situation. McMahon & Miller, "The Crain Myth—A Criticism of the Duree and Stephens Cases," 20 La.L.Rev. 449, 454-55 (1960). This objection could not apply to tax-refund suits, however, since Act 330 did not require prior legislative appropriations to satisfy judgments in these cases; successful taxpayers were simply repaid from tax funds the Collector had segregated.

tion, the argument is without merit. As the Louisiana courts have frequently pointed out, the legislature may act in all matters that the Constitution does not prohibit.[12] No Louisiana Constitution prior to that of 1898 contained a provision relating to suits against the state, yet in 1890 the Louisiana Supreme Court recognized the legislature's power to authorize such suits and said that legislative authorizations had been "of common occurrence." *Carter v. State*, 1890, 42 La.Ann. 927, 8 So. 836. See also *Hood v. State*, 1908, 120 La. 806, 45 So. 733; *Durbridge v. State*, 1906, 117 La. 841, 42 So. 337, 339.[13]

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[12]*Plebst v. Barnwell Drilling Co.*, 1963, 243 La. 874, 148 So.2d 584, 589; *State v. Pete*, 1944, 206 La. 1078, 20 So.2d 368, 371; *Ricks v. Department of State Civil Serv.*, 1942, 200 La. 341, 8 So.2d 49, 62; *Ward v. Leche*, 1938, 189 La. 113, 179 So. 52, 54; *State v. Cusimano*, 1937, 187 La. 269, 174 So. 352, 355; *State ex rel. Porterie v. Charity Hosp.*, 1935, 182 La. 268, 161 So. 606, 609; *Ascension Red Cypress Co. v. New River Drainage Dist.*, 1932, 175 La. 300, 143 So. 270, 274; *State v. Sharp*, 1932, 174 La. 860, 141 So. 859, 860.

[13]To support his contention that waiver of immunity must come from the Constitution, the Collector relies on *Lewis v. State*, 1945, 207 La. 194, 20 So.2d 917, 919, where the Louisiana Supreme Court said:

> "Prior to the adoption of the Constitution of 1898, it does not appear that there was any constitutional or statutory provision in this State permitting the waiver of the State's exemption from suit. By Article 192 of the Constitution of 1898, . . . the Legislature *was given the power* to authorize a suit against the State." (Emphasis supplied.)

While this quotation may arguably support the Collector's position, the court in *Lewis* was in no way concerned with whether the Louisiana legislature needed constitutional authority to authorize a suit against the state.

The Collector also argues that the language of the present Article III, Section 35, shows that the legislature is powerless to act apart from the constitutional provision. The section declares, "[T]he Legislature is empowered to waive . . . the immunity from suit and from liability of the state . . ." The use of the word "empowered" can be explained, however, by developments that occurred shortly before enactment of the 1960 amendments. While it did not suggest that constitutional authorization was necessary for suits against the state, the Louisiana Supreme Court held that the 1946 amendment *prohibited* the

[7] Even if constitutional authorization were necessary, a provision other than Article III, Section 35, could justify Act 330. Article X, Section 18, by requiring the legislature to "provide . . . for the prompt recovery by every taxpayer of any illegal tax paid by him", grants the legislature discretion in devising a remedy at law. Act 330 is entitled "AN ACT—To carry into effect Section 18, Article X of the Constitution of Louisiana . . .," and Louisiana courts have consistently considered the Act to be an implementation of Article X, Section 18, and not of Article III, Section 35.[14]

Finally, the Collector argues that Act 330 itself does not authorize this suit. He relies on *United States v. Cocreham*, E.D.La., 1965, 247 F.Supp. 731, where the district court, in dicta, declared that Act 330 does not authorize suits against the state by private litigants, but only by the United States. The conflict that

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legislature from waiving the state's immunity from liability. *Stephens v. Natchitoches Parish School Bd.*, 1959, 238 La. 388, 115 So.2d 793; *Duree v. Maryland Cas. Co.*, 1959, 238 La. 166, 114 So.2d 594. The principal purpose of the 1960 amendment was to allow the legislature to waive the state's immunity from liability. See *Fullilove v. United States Cas. Co.*, 2d Cir. La.App., 1961, 129 So.2d 816, cert. denied; McMahon & Miller, "The Crain Myth", supra note 11. Of course, a constitutional enactment abrogating a previous constitutional restriction is in one sense a grant of power to the legislature; this fact does not conflict with the accepted principle that the legislative power is plenary in the absence of any restriction. *State Through Dept. of Highways v. Macaluso*, 1958, 235 La. 1019, 106 So.2d 455, n. 1(a).

[14]See *Willis v. Flournoy*, 1959, 236 La. 983, 109 So.2d 490, 493; *Willis v. Flournoy*, 1956, 231 La. 264, 91 So.2d 33, 36; *Olan Mills, Inc., of Tenn. v. City of Bogalusa*, 1954, 225 La. 648, 73 So.2d 791, 798 (opinion on rehearing); *A. Sulka & Co. v. City of New Orleans*, 1945, 208 La. 585, 23 So.2d 224, 227; *Higgins, Inc. v. Walker*, 1st Cir. La.App., 1961, 129 So.2d 840, 848, cert. denied. See also *Great Lakes Dredge & Dock Co. v. Huffman*, 1943, 319 U.S. 293, 296-297, 63 S.Ct. 1070, 87 L.Ed. 1407.

the court perceived between Act 330 and the Louisiana Constitution compelled it to draw this conclusion:

> "At first blush it would seem that [Act 330 and Article III, Section 35] . . . are in conflict in that the statute apparently allows a suit to be brought in either the State or Federal Court for recovery of taxes paid under protest, while the Constitution of the State of Louisiana prohibits a suit against the State of Louisiana. Actually, these two provisions are not in conflict because of the fact that the statutory provision affording a legal remedy gives a right of action in any 'state or federal court *having jurisdiction of the parties and the subject matter* . . .' This provision is obviously included for the purpose of giving effect to well settled jurisprudence to the effect that under certain circumstances a state may be sued in a Federal Court even without its consent. Thus, it is well settled that the Federal District Court does have jurisdiction over a case brought by the United States against a state. . . . Also, it is well settled that in such a case, consent of the state is not required. . . . Thus no violence is done to [Act 330] . . . by holding that the statute does not give consent to Chrysler Corporation to maintain this action against the State of Louisiana in a Federal Court. The State of Louisiana is expressly prohibited from granting such authority to be sued in a Federal Court by the provisions of Article III, Section 35, of the Louisiana Constitution . . ." (Emphasis in original.)

Neither the language of Act 330 nor any previous decision supports the theory that the Act limits access to the federal courts to the United States. The lan-

guage of Section 2(c) of the Act, which the district court may have overlooked in *United States v. Cocreham*, militates against this view. Section 2(c) provides:

> "This Section shall be construed to provide a legal remedy in the State or federal courts, by action at law in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States . . ."

If this section referred only to suits by the United States, it would be superfluous. As the court in *United States v. Cocreham* recognized, the United States may sue Louisiana in federal court without the state's consent. The court interpreted Act 330 to limit access to the federal courts to the United States only because of its view that if the Act allowed individuals to sue the state in federal court, it would conflict with Article III, Section 35. Our holding that the 1946 and 1960 amendments to this constitutional provision were not designed to affect Act 330 removes the need for this strained interpretation of the statute.

II.

Under Article I, Section 8, clause 17, of the United States Constitution, Congress has exclusive legislative jurisdiction over areas that the United States has acquired with the consent of the state in which the property is located.[15] The parties agree that Barksdale

[15] "Section 8. Clause 17. The Congress shall have Power to ex-

Air Force Base is a federal enclave subject to this constitutional provision. The second question that we must decide is whether the State of Louisiana may levy a severance tax on an event taking place within the federal area.

[8] A. Resolution of this dispute requires a reconsideration of this court's decision in *Mississippi River Fuel Corp. v. Fontenot*, 1956, 234 F.2d 898. That case, involving the same parties now before the court, held that the Mississippi River Fuel Corporation's operations at Barksdale Field were not exempt from the Louisiana severance tax.[16] Since that decision, the United States Supreme Court has reviewed the problem of state taxation in federal enclaves. In *Humble Pipe Line Co. v. Waggonner*, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed.2d 782, the Court held that the State of Louisiana could not levy an ad valorem tax on privately owned personal property located on Barksdale Field. In the light of the Humble decision, *Mississippi River Fuel Corp. v. Fontenot* cannot stand.

This court's decision in *Mississippi River Fuel Corp. v. Fontenot* rested on two alternate grounds: (1) A provision of the Company's contract with the

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ercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

[16]The earlier decision is not res judicata of the current controversy, because it dealt only with severance taxes levied prior to 1956. Under Louisiana law, each imposition of a tax may be the subject of a suit for refund regardless of the outcome of any prior suit. *Hubert v. City of New Orleans*, 1906, 116 La. 507, 40 So. 853.

federal government requiring the Company "to pay all taxes lawfully assessed and levied" compelled the Company to pay nondiscriminatory taxes that the State of Louisiana imposed; (2) The severance tax did not interfere with the exclusive jurisdiction of the United States, since the United States had never held title to the minerals severed.

The Supreme Court clearly rejected the first of these holdings in *Humble*. The Court held that "[a] contractual requirement to pay taxes lawfully owing, standing alone, cannot be read as manifesting a purpose of the Government to abandon exclusive jurisdiction over one of its important military enclaves." In the present case neither the district court nor the Collector sought to support the tax on the basis of the Company's contract with the Government.

The district court did reassert the view that Louisiana's severance tax is consistent with Congress' exclusive jurisdiction over Barksdale Field, but we consider that *Humble* also overruled this second ground of the 1956 *Mississippi River Fuel Corp.* decision. The *Humble* opinion was principally concerned with whether Congress had exclusive legislative jurisdiction over Barksdale Field or whether it held the base only in a proprietary capacity. After deciding that Congress had exclusive legislative power, the Supreme Court said, "When Congress has wished to allow a State to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§ 104–110." The Court concluded therefore that the state's inability to tax, in the absence

of authorization from Congress, followed automatically from a finding that property that the state sought to tax was located in an area under the exclusive jurisdiction of Congress. The Court thereby reaffirmed the long line of decisions that a state may not legislate for a federal enclave even if the legislation does not conflict with a regulation of Congress or interfere with a federal function or instrumentality.[17]

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[17]E. g., *Paul v. United States*, 1962, 371 U.S. 245, 263-264, 83 S.Ct. 426, 9 L.Ed. 2d 292; *James v. Dravo Contracting Co.*, 1937, 302 U.S. 134, 140, 58 S.Ct. 208, 82 L.Ed. 155; *Standard Oil Co. v. People of State of California*, 1934, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; *Surplus Trading Co. v. Cook*, 1930, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091; *United States v. Unzeuta*, 1930, 281 U.S. 138, 142, 50 S.Ct. 284, 74 L.Ed. 761; *Fort Leavenworth R.R. v. Lowe*, 1884, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264. See generally Report of Interdepartmental Committee for Study of Jurisdiction Over Federal Areas Within the States, Part II, Govt.Ptg.Office, 1957; Note, Federal Areas: The Confusion of a Jurisdictional-Geographic Dichotomy, 1952, 101 U. of Pa.L.Rev. 124; Note, Land Under Exclusive Federal Jurisdiction: An Island Within a State, 1949, 58 Yale L.J. 1402.

The Collector nevertheless argues that the severance tax is consistent with the exclusive jurisdiction of the United States. He relies on *S.R.A., Inc. v. State of Minnesota*, 1945. 327 U.S. 558, 66 S. Ct. 749, 90 L.Ed. 851, and *Howard v. Commissioners of Sinking Fund*, 1953, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617. *S.R.A.* concerned the validity of a state tax on land once subject to the exclusive jurisdiction of the United States. The Supreme Court upheld the tax, because the United States had relinquished its jurisdiction by selling the equitable ownership of the entire tract to a private company. In contrast, the United States has not surrendered its jurisdiction over any part of Barksdale Field, although it has leased the right to exploit parts of the enclave for oil and gas; it is settled that the United States retains exclusive legislative power over all of an area acquired with the state's consent, even though it allows a portion of the property to be used by private parties for nongovernmental purposes. *Humble Pipe Line Co. v. Waggonner, supra; United States v. Unzeuta, supra; Arlington Hotel Co. v. Fant*, 1929, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447; *Benson v. United States*, 1892, 146 U.S. 325, 331, 13 S.Ct. CO, 36 L.Ed. 991. In *S.R.A.* the Supreme Court recognized that when exclusive jurisdiction is retained, state laws are ineffective to tax property within the federal enclave, 327 U.S. 562-563, 66 S.Ct. 749.

Nor does *Howard v. Commissioners of Sinking Fund* support the Collector's position. The issue in *Howard* was whether the City of Louisville could impose a tax on activities within a federal enclave. The

[9] In the present case, the district court, following this court's 1956 decision, emphasized that under Louisiana law oil and gas is not subject to ownership until it is reduced to possession; accordingly, the United States never held title to the oil and gas underlying Barksdale Field. Under *Humble*, however, this principle of Louisiana law does not help the Collector. The personal property that the Supreme Court held exempt from Louisiana's ad valorem tax in *Humble* had never belonged to the United States.[18]

[10] The district court nevertheless concluded that *Humble* did not overrule *Mississippi River Fuel Corp. v. Fontenot*, because *Humble* involved an ad valorem tax while the earlier decision, like the present case, involved a severance tax. While there are differences between the taxes involved, we think that *Humble* did not rest on the peculiar attributes of the ad valorem

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Supreme Court first decided that it was consistent with Congress' exclusive jurisdiction for the city to annex the federal area; a federal enclave remains a geographic part of the city, county, and state in which it is situated, and "[a] state may conform its municipal structures to its own plan" without interfering with Congress' exclusive jurisdiction within the federal area. 344 U.S. at 626-627, 73 S.Ct. at 467. The annexation of the enclave was significant because Congress, in the Buck Act, had granted to states and their subdivisions the right to levy an income tax within federal enclaves, 4 U.S.C.A. § 106(a), and the City of Louisville had imposed such a tax in enclaves located within its municipal boundaries. By holding that the State of Kentucky and its political subdivisions retained control over their own geographic boundaries *Howard* did not therefore imply that a state has legislative power within a federal enclave unless exercise of that power interferes with the federal government. The Supreme Court upheld the city's power to tax only because of express congressional authorization: The Court recognized that Congress alone had political control within the federal area.

[18]It has long been settled that privately owned property located in a federal enclave is exempt from state taxation. E. g., *Surplus Trading Co. v. Cook*, supra, note 17; *Fort Leavenworth R.R. v. Lowe*, supra, note 17.

tax. It rested instead on the general principle that a state lacks authority to levy any tax in an area under the exclusive jurisdiction of the United States. Just as the state could not tax personal property located on Barksdale Field, it cannot impose a severance tax when the incidence of taxation, the severance of minerals from the soil, takes place on a federal enclave, outside the jurisdiction of the State of Louisiana.

B. The Collector argues that even apart from *Mississippi River Fuel Corp. v. Fontenot*, the Louisiana severance tax is enforcible because it antedated the acquisition of Barksdale Field by the United States. He cites *James Stewart & Co. v. Sadrakula*, 1939, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, and *Paul v. United States*, 1962, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292, in support of this position. In those cases, the Supreme Court applied to federal enclaves a rule of international law that when one sovereign takes over the territory of another, the municipal laws of the original government remain in effect until changed. This doctrine is consistent with exclusive federal jurisdiction, because the laws adopted become laws of the United States. *James Stewart & Co. v. Sadrakula, supra; Mater v. Holley*, 5 Cir., 1953, 200 F.2d 123.

In *Humble* the state argued that this doctrine should apply to tax laws in existence at the time of acquisition. It relied on the same cases that the Collector cites here. The Supreme Court did not consider explicitly the issue of residual jurisdiction, but its holding that Louisiana lacked the power to impose the

ad valorem tax indicates that the doctrine of adoption does not apply to state tax laws.

The doctrine of residual jurisdiction has traditionally been limited to "laws which are intended for the protection of private rights," or "laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity." It has not applied to laws "in conflict with the political character [and] institutions . . . of the new government." *Chicago, R. I. & P. Ry. v. McGlinn*, 1884, 114 U.S. 542, 5 S.Ct. 1005, 29 L.Ed. 270. Blackstone defined a municipal law as "a rule of civil conduct prescribed by the Supreme power of a State, commanding what is right and prohibiting what is wrong." 1 Blackstone, Commentaries 44.

[11] We consider that the doctrine of residual jurisdiction does not apply to state tax laws. Legislation that a former sovereign enacted to raise revenue for its own purposes is not the kind of law that a new government would adopt as a matter of comity in order to avoid a legislative vacuum in a newly-acquired area.[19]

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[19] *James Stewart & Co. v. Sadrakula, supra,* was a wrongful death action. The Supreme Court held that a state statute requiring contractors to plank floor beams for the protection of workmen remained in effect in a federal enclave after the United States had acquired jurisdiction. The Court pointed out that without the doctrine of residual jurisdiction an area subject to a jurisdictional transfer would be left without any developed legal system for the protection of private rights.

In *Paul v. United States, supra,* the Supreme Court quoted with approval the portion of *James Stewart & Co.* limiting the doctrine of residual jurisdiction to laws enacted for the protection of private interests. The Court then held that a California statute setting a mini-

[12] C. Finally, the Collector contends that Congress, in the Buck Act,[20] retroceded to the State of Louisiana jurisdiction to levy the tax. The portion of the Buck Act on which the Collector relies provides that a state may levy an income tax in a federal enclave within the state to the same extent as if the area were not a federal enclave. 4 U.S.C.A. § 106. The Act defines "income tax" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C.A. § 110(c). The Louisiana severance tax is "levied upon all natural resources severed from the soil . . . including . . . minerals such as oil [and] gas . . .," LSA–R.S. 47:631, and is measured by the quantity of minerals severed, LSA–R.S. 47:633. Congress has authorized the states to impose an income tax on private persons in federal enclaves, but the Louisiana severance tax is simply not an income tax. We are not free to expand the technical and precise language that Congress has used.

The judgment is reversed.

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mum price for the sale of milk could apply to milk purchases on a federal enclave made from nonappropriated funds, if the price control law was in force when the United States acquired the federal area. While a minimum price law on milk might not traditionally have been considered a law "intended for the protection of private rights," it is closer to such a law than is a statute imposing taxes for the benefit of a state. In the absence of a contract with the federal government, the state is not obliged to provide the inhabitants of a federal enclave with the governmental services that it provides for its own citizens. *Fort Leavenworth R.R. v. Lowe*, 1884, 114 U. S. 525, 5 S.Ct. 995; Report of Interdepartmental Committee for Study of Jurisdiction Over Federal Areas Within the States, Part II, supra, note 16. The Collector cites no instance in which the doctrine of residual jurisdiction has been applied to tax laws. One state court has refused to so apply it. *O'Pry Heating & Plumbing Co. v. State*, 1941, 241 Ala. 507, 3 So.2d 316.

[20] 4 U.S.C. §§ 104-110.

(2) Judgment of the Court of Appeal

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Roland Cocreham, Collector of Revenue of the State of Louisiana, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 13, 1967

Issued as Mandate:

(3) Stay of the Mandate by the Court of Appeal

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the

United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 16th day of January, 1968.

/s/ John Minor Wisdom

UNITED STATES CIRCUIT JUDGE

(ORIGINAL FILED—JANUARY 16, 1968)

APPENDIX D

Title 47, Section 1576, Louisiana Revised Statutes of 1950.

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Subtitle. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and

he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

APPENDIX E

Sections 1431–1438, Title 47, Louisiana Revised Statutes of 1950

§ 1431. Taxpayer's petition

Whenever a taxpayer is aggrieved by an assessment made by the collector, or by the collector's action or failure to act on a claim for refund or credit of an overpayment, such taxpayer may appeal to the board for a redetermination of the assessment or a determination of the alleged overpayment, by filing a petition with the board within the respective periods set forth in R.S. 47:1565, 47:1566 and 47:1625.

§ 1432. Notice; hearing; decision

In each proceeding for the redetermination of an assessment or for the determination of an overpayment notice and opportunity to be heard shall be given to the taxpayer and the collector and a decision or judgment shall be made as quickly as practicable.

§ 1433. Publication of opinions and decisions

The board shall provide for the publication of such of its reports, opinions and decisions or judgments as are of public interest, in such form as it may deem best adapted for public convenience and use, and such authorized publication shall be competent evidence of the reports of the board therein contained in all courts of the state, without any further proof or authentication thereof.

§ 1434. Judicial review of decision of the board

After a decision or judgment of the board, the

collector or the taxpayer may, within thirty calendar days after such decision or judgment has been rendered and signed, file a petition with the district court in accordance with the provisions hereinafter set out, for review of the said decision or judgment of the board. The party filing such petition shall before the filing of same, either at open hearing or by motion, notify the board of his intention to file such petition for review. Provided that when the board has found any tax to be due, a taxpayer must, when giving the notice of intention to file a petition for review, post bond, with surety approved by the board conditioned upon the payment of the tax as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, payable to the collector, in an amount not to exceed one and one-half times the said tax, interest, and penalty found to be due in said decision or judgment of the board, and the posting of such bond shall be a condition precedent to the filing of any petition for review in any district court.

Thereafter, and within the thirty calendar days from the date of the rendering and signing of such decision or judgment of the board, the taxpayer may file his petition for review with the proper district court, setting forth specifically any errors which may have been committed by the board in reaching its decision or judgment.

When the district judge has ordered the review, a copy of the order and petition shall be mailed to the secretary-clerk of the board, and the opposing party

or counsel representing him, and the order shall command the secretary-clerk of the board to send up within twenty days from the date thereof the original transcript of the record, together with all exhibits and evidence thereto attached; which record shall be the basis for any action on review and the decision of the district court shall be rendered upon the said record as made up before the board.

§ 1435. Jurisdiction of district courts to review decisions of the board

The district courts shall have exclusive jurisdiction to review the decisions or judgments of the board, and the judgment of any such court shall be subject to further appeal, suspensive only, in accordance with law. If a suspensive appeal is taken from a judgment of the district court no further bond need be posted and the bond originally posted remains in full force and effect to guarantee the payment of any tax, interest, and penalty until final decision of the court.

Upon such review, such courts shall have the power to affirm or, if the decision or judgment of the board is not in accordance with law, to modify, or to reverse the decision or judgment of the board, with or without remanding the case for further proceedings as justice may require.

§ 1436. Determination of which district court has jurisdiction

A decision or judgment of the board may be reviewed:

(1) In the case of an individual, by the district

court for the district whereof he is a resident, or if not a resident of any district, then by the district court for the parish of East Baton Rouge.

(2) In the case of a person other than an individual, except as provided in paragraphs (3), (4), and (5) of this Section by the district court for the parish of East Baton Rouge.

(3) In the case of a corporation which has a principal office or agency in Louisiana, then by the district court for the district where such principal office or agency is located.

(4) In the case of a corporation which has no principal office or agency in Louisiana, then by the district court for the parish of East Baton Rouge.

(5) In the case of an agreement between the collector and taxpayer, then by the district court as stipulated in the agreement.

§ 1437. Effect of final judgment

When the decision or judgment of the board which has become final contains a finding that the taxpayer is liable for the payment of an amount of tax, interest and penalty, such amount shall be paid by the taxpayer upon notice and demand from the collector, and shall be collectible by distraint and sale, as provided in R.S. 47:1570 through 47:1573.

When the decision or judgment of the board which has become final contains a finding that the taxpayer is entitled to receive a refund or credit of an overpayment, the collector shall promptly enter the credit or make the refund, as the case may be.

§ 1438. Date judgment becomes final

For the purposes of this Title, the date on which a decision or judgment of the board becomes final shall be determined as provided herein. The decision or judgment of the board shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for appeal, if the decision or judgment of the board has been affirmed or the petition for review dismissed by the district court, and no appeal has been taken; or

(3) Upon dismissal of the appeal, if the decision or judgment of the board has been affirmed or the petition for review dismissed by the district court; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the supreme court, if such court directs that the decision or judgment of the board be affirmed or the petition for review dismissed.

If the Supreme Court directs that the decision or judgment of the board be modified or reversed, the decision or judgment of the board rendered in accordance with the mandate of the supreme court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either the collector or the taxpayer has instituted proceedings to have such decision or judgment corrected to accord with the mandate, in which event the

decision or judgment of the board shall become final when so corrected.

If the decision or judgment of the board is modified or reversed by the district court, and if the time allowed for taking an appeal has expired and no such appeal has been taken; or if the appeal has been dismissed; or if the decision of the court has been affirmed by the supreme court, then the decision or judgment of the board rendered in accordance with the mandate of the district court shall become final on the expiration of thirty days from the time such decision or judgment of the board was rendered, unless within such thirty days either the collector or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision or judgment of the board shall become final when so corrected.

If the Supreme Court orders a rehearing, or if the case is remanded by the district court to the board for rehearing, and if the time allowed for taking an appeal has expired, and no such petition has been duly filed; or if the appeal has been dismissed; or if the decision of the court has been affirmed by the supreme court, then the decision or judgment of the board rendered upon such rehearing shall become final in the same manner as though no prior decision or judgment of the board has been rendered.

As used in this section, the term "district court" means any district court of the State of Louisiana having jurisdiction to review the decision or judgment

of the board; and the term "mandate" in case a mandate has been recalled prior to the expiration of thirty days from date of issuance thereof, means the final mandate.

APPENDIX F

Article 10, Section 21, Constitution of Louisiana

§ 21. Severance tax on natural resources

Section 21. Levy; rate; allocation to parishes. Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance; but such tax on sulphur shall not exceed One Dollar and Three Cents ($1.03) per long ton of 2,240 pounds, provided that the present severance tax on sulphur shall be, and is, hereby fixed at One Dollar and Three Cents ($1.03) per long ton of 2,240 pounds, effective as of the twentieth day after the present Legislature shall have adjourned, and shall be collected and expended in accordance with existing laws for the collection of severance taxes on natural resources. Such natural resources may be classified for the purpose of taxation and such taxes may be predicated upon either the quantity or value of the products at the time and place of severance. No severance tax shall be levied by any Parish or other local subdivision of the State . . .

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No. 1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Petitioner

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This brief in opposition to the petition of the Collector of Revenue of the State of Louisiana for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is filed under the authority of Rule 24.

For the reasons set forth below, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RULE 19 DOES NOT CONTEMPLATE CERTIORARI IN A CASE SUCH AS THIS

Rule 19 of the Rules of this Honorable Court lists considerations governing the granting of certiorari, pointing out that this is a matter of sound discretion rather than a right.

The following are pertinent items set out in the rule which are illustrative of cases where the writ is granted:

1. Conflict of decisions by Courts of Appeals.
2. Conflict of decision by Court of Appeals with decision by state law.
3. A Court of Appeals has decided an important question of federal law which should be settled.
4. A Court of Appeals decision is in conflict with applicable decisions by this court.
5. A Court of Appeals has departed from the usual course of judicial proceedings in such a way as to call for supervisory attention.

It is suggested that none of these criteria is applicable in this case. On the contrary, the Court of Appeals has firmly adhered to the decisions of this Court, notably *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L. Ed.2d 782. 84 S.Ct. 857 (1964), which announced exclusive federal jurisdiction over the very enclave (Barksdale Air Force Base) which is involved here and held that

Louisiana was without jurisdiction to levy ad valorem taxes on privately owned property situated on the enclave.

The Court of Appeals, relying on *Humble* and prior decisions of this Court, decided that Louisiana was without jurisdiction to levy a severance tax(1) on oil and gas produced from wells on Barksdale Air Force Base, and, in so doing, Judge Wisdom, speaking at the time for the entire panel, said:

> "* * *. After deciding that Congress had exclusive legislative power [over Barksdale Air Force Base], the Supreme Court said, 'When Congress has wished to allow a State to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§ 104-110.' The Court concluded therefore that the state's inability to tax, in the absence of authorization from Congress, followed automatically from a finding that property that the state sought to tax was located in an area under the exclusive jurisdiction of Congress. The Court thereby reaffirmed the long line of decisions that a state may not legislate for a federal enclave even if the legislation does not conflict with a regulation of Congress or interefere with a federal function or instrumental-

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(1) Louisiana's severance tax on oil and gas is levied on the owner of these minerals at the time of severance. La. R.S. 47:631 et seq., Appendix B to this brief page 22; Article X, § 21, La. Const., Petition, Appendix F, page 88. La. R.S. 47:634 contains these definitions:

"'Owner' means owner at the point of severance."

"'Severed' means the point at which the natural resources are severed from the surface of the earth or water."

ity." (382 F. 2d 937; Petition, Appendix C, page 71.)

"* * *. While there are differences between the taxes involved [ad valorem and severance], we think that *Humble* did not rest on the peculiar attributes of the ad valorem tax. It rested instead on the general principle that a state lacks authority to levy any tax in an area under the exclusive jurisdiction of the United States. Just as the state could not tax personal property located on Barksdale Field, it cannot impose a severance tax when the incidence of taxation, the severance of minerals from the soil, takes place on a federal enclave, outside the jurisdiction of the State of Louisiana." (382 F. 2d 938; Petition, Appendix C, page 73.)

Clearly, under the basic principles announced in *Humble*, the levy of a tax on the owner of minerals immediately upon severing them from the surface of the earth is beyond the legislative authority of Louisana when the severance takes place on land over which the United States has exclusive jurisdiction under Article 1, Section 8, Clause 17, of its Constitution.

THIS CASE IS NOT AN EXCEPTION TO, BUT IS GOVERNED BY HUMBLE PIPE LINE COMPANY V. WAGGONNER

Petitioner in his effort to take this case out of the rule of *Humble* attempts to make three points:

POINT No. 1

The argument seems to be that the only remedy the taxpayer has is a suit in state court because of 28 U.S.C. § 1341, which reads as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and sufficient remedy may be had in the courts of such state."(2)

By its own wording, the codal provision is inapplicable here because this action to recover taxes which have been paid under protest in no way seeks to "enjoin, suspend or restrain the assessment, levy or collection" of the tax. On the contrary, the Louisiana legislature passed the act under which respondents are proceeding for the express purpose of providing an adequate remedy at law for contesting taxes and thus obviating injunctions. This act, 330 of 1938 (La. R.S. 47:1576; Petition, Appendix E, page 79), specifically authorizes actions in federal court for the recovery of taxes paid under protest thereunder.

City of Houston v. Standard-Triumph Motor Company, 347 F. 2d 194 (1965), and *Great Lakes Dredge &*

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(2) Louisiana could have limited jurisdiction to recover taxes under her "plain, speedy and efficient remedy statute" (Act 330 of 1938) to state courts, but, certainly, section 1341 does not suggest or even imply that federal district courts cannot hear jurisdictional cases brought under the state law when so empowered by the legislature of the State.

Dock Company v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L. ed 1407 (1943), were suits for a declaratory judgment which, as was pointed out in the latter case, "may in every practical sense operate to suspend collection of state taxes until the litigation is ended." They are in no way analagous to a suit brought under the state law to recover taxes which have been paid and are under the control of the Collector.

Petitioner suggests that this point was not considered by the Court of Appeals because it was urged too late. To us, this is presumptuous since petitioner made the identical argument to the Court of Appeals in a supplemental petition for rehearing filed on December 19 or 20 in opposition to which respondents replied by brief filed on December 30. The Court of Appeals in its per curiam opinion of January 8 refused to grant petitioner's motion for a rehearing. It had considered 28 U.S.C. 1341 and in effect had rejected this contention in the original opinion when it said (382 F. 2d 934; Petition, Appendix C. page 64):

> "Act 330 forbids Louisiana courts from enjoining the collection of state taxes, and no subsequent legislation, including the constitutional amendments of 1946 and 1960, is inconsistent with this provision. If the amendments to Article III, Section 35, do not affect Act 330, federal courts are similarly powerless to enjoin state taxes, because Act 330 gives the taxpayer an adequate state remedy." If, however, the amendments apply to taxpayers' suits, they have restored the defect that Act 330 was designed to cure and have made federal courts

again available to enjoin the collection of unconstitutional taxes."

Footnote 9 states:

"28 U.S.C.A. § 1341 provides, 'The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.'"

This analysis of Act 330 of 1938 in the light of 28 U.S.C. § 1341 is a clear expression of the Fifth Circuit's opinion of the meaning of the federal statute and its application to this action.

POINT No. 2

This point relates to the ownership of oil and gas under Louisiana law, but before delving into this question we want to point out how completely immaterial it is to the issue. It matters not who, if anyone, owned the minerals in the subsurface formation from which they have been recovered. The facts that do matter are that the minerals were severed by wells within the federal enclave, Barksdale Air Force Base; that respondents owned these minerals at the time of severance; that under *Humble* it clearly has been decided that Congress had exclusive jurisdiction and legislative power over this very enclave; and that the incident of the attempted state tax (the severance of the minerals) took place on this enclave. Under these circumstances *Humble* holds that the State of Louisiana lacks authority to levy such a tax and ownership of the minerals before severance is totally immaterial.

However, since petitioner argues that the rights of a fee simple owner (in Louisiana this is called "perfect ownership") in the minerals underlying his land is important to the decision of the case, we feel compelled to discuss this point.

First, we submit that petitioner's position is erroneous and the position taken by the United States in this regard in the memorandum filed for it as *amicus curiae* in the Court of Appeals,[3] is correct where it says:

> "*Humble* held that the United States had acquired fee simple title to the entire tract. A fee simple title 'is the most extensive interest which one may possess in landed property, and absolute estate in perpetuity.' *United States v. Sunset Cemetery Co.*, 132 F.2d 163, 165 (C.A. 7, 1942). Thus, regardless of theories of ownership of oil and gas prior to extraction, the United States owned all rights on the land composing Barksdale Air Force Base. There is no room for implying a reservation by Louisiana of rights to any part thereof, above or below ground. We do not understand appellee to deny that the United States possessed exclusive right to extract the mineral itself or to assign that right to others. It is hard to see on what basis Louisiana can tax the privilege of extraction of the oil and gas — a privilege, the exercise of which Louisiana cannot control in an exclusive jurisdiction area."

The foregoing statement is fully supported by Louisina law.[4] In Louisiana the owner of the land does

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(3) Appendix A of this brief.

(4) *Rives v. Gulf Refining Company*, 133 La. 178, 62 So. 623 (1913).

have definite and distinct rights in the minerals underlying that land. The landowner has the exclusive right to search for and produce minerals from his land and acquires absolute ownership of them when produced. In this sense he does have "title" to the minerals. He lacks "ownership" of those minerals only to the extent that, if they migrate under another's property and are there severed from the land and reduced to possession, the owner of the land to which they have migrated and who has produced them becomes the owner of those minerals. This is really but another way of phrasing the rule of *capture* which is found in all the other states.

This "title" is severable from the surface of the land and available as an article of commerce. Therefore, to say, as does petitioner, that title does not pass with the acquisition of the land simply is not accurate.

As a recognized authority on the subject observed:(5)

> "This concept of nonownership developed by the court recognized only that there is no separate corporeal mineral estate, a position which has been consistently adhered to by subsequent decisions. In Griffiths v. Enochs, an action involving title to land where jurisdictional amount had to be determined, the court was required to recognize the mineral value of the land, 'since under Louisiana law there is no separate corporeal mineral estate.' It does not follow that the landowner is without a

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(5) Daggett, Mineral Rights in Louisiana, Revised Edition, Chapter 1, § 1, "Nonownership Theory," p. 7.

recognized interest in the oil and gas in place. The reference to nonownership in Louisiana simply means that oil and gas in place are not subject to absolute ownership as specific things apart from the soil. The property interest is the right to reduce to possession, and the reservation or sale of this right is the creation of a servitude, not of a separate estate in realty.

"As will be noted later, the question of ownership of oil and gas in place is in many aspects a distinction without a difference. The application of different rules obviously results. Regardless of which theory is recognized, a dismemberment of the realty and a depletion of the value of the land follows."

In a suit in which it was called upon to determine the value of a tract of land the Supreme Court of Louisiana, speaking through the Chief Justice, recognized the attributes of fee simple ownership when it stated:(6)

"We cannot quite follow the logic of this argument and the conclusion reached by the Court of Appeal in the Silbernagel case for when the plaintiff executed the deed transferring the property in controversy to the bank unencumbered by any real right toward any other person, the bank acquired the same in perfect ownership (Article 490 of the Revised Civil Code) and this, of necessity, carried with it 'the ownership of all that is directly above and under it,' including the right to construct below the soil all manner of works and to dig as deep as necessary in order to draw from the soil all of the benefits it is felt might accrue."

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(6) *Jones v. First National Bank*, 215 La. 862, 41 So. 2d 811, 813 (1949).

Appropriate is the comment of the Fifth Circuit in *Buras v. Timolat*, 275 F. 2d 797, 799 (1960):

> "We do not interpret any of the [Louisiana] statutes or decisions placed before us as casting any doubt upon the postulate that perfect ownership of land includes the minerals in it."

Petitioner places great emphasis on the dissent of Judges Rives from the refusal to grant a rehearing. In so doing, he overlooks the conclusions upon which the decision of the majority was based, namely that, (a) the Louisiana severance tax is levied upon the owners of the minerals at the time of severance, (b) respondents were the owners of the minerals at that time, (c) severance took place on Barksdale Air Force Base, (d) the United States has exclusive jurisdiction over Barksdale Air Force Base, (e) under the decision in *Humble*, Louisiana cannot levy taxes on the enclave without the express consent of Congress, and (f) Congress has not retroceded jurisdiction.

However, even if Louisiana mineral law is important, the dissenting judge's misunderstanding of such was pointed out in the per curiam, where the author who was a Louisiana practitioner and is a commentator of note on the laws of the State, correctly states the law to be that title to the land carries with it "the right to explore for oil and gas and reduce these minerals to possession and ownership," (Petition, Appendix A, page 29).

Judge Rives' dissent is predicated on the single propositon that the Legislature of the State of Louisiana

has never given its consent for the acquisition by the United States of the oil and gas underlying Barksdale Air Force Base, or of the right to reduce that oil and gas to possession free from the state severance tax. Lacking this "consent" of the state, he concludes that the United States does not have exclusive jurisdiction or the power to exercise exclusive legislation over the Barksdale Base. This failure of "consent" over oil and gas came about, says Judge Rives, because simply: "In Louisiana, acquisition of the 'land' does not pass title to the oil and gas underneath the surface."

As heretofore pointed out in this brief, the expression quoted immediately above is simply not a correct statement of the law of Louisiana where a fee simple purchaser acquires the exclusive and merchantable right to explore for and reduce to possession the minerals underlying his land.

Carried to its conclusion in the direction in which it is aimed, the dissent must rest on the proposition that the State of Louisiana is the owner of all minerals underlying lands within the boundaries of the State(7) This is

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(7) While Judge Rives disclaims that he is contending that the State owned oil and gas under Barksdale in the proprietary sense, the idea of state ownership appears in his next sentence, "Nonetheless, I have some doubt about my brothers' disparagment of the State's ownership of oil and gas," and later, "With deference to my brothers, I submit that the State's ownership of oil and gas is not disputed by the Louisiana Supreme Court in any of the five decisions cited in my brothers' per curiam."

clearly not the law of Louisiana and not even petitioner contends that it is.

United States v. Louisiana, 339 U.S. 699, 94 L ed 1216 (1950), cited in the dissent, has no place here because as this Court well knows it dealt with the claim of Louisiana to submerged lands off her coast, including the minerals underlying the same. Louisiana was claiming a fee simple title.

Likewise *Silas Mason Company v. Tax Commission*, 302 U.S. 186, 82 L ed 187 (1937) is not in point because in that case this Court found that the consent statute of the State of Washingon did not confer exclusive jurisdiction on the United States. The converse is true here where the Court already has decided in *Humble* that the United States acquired exclusive jurisdiction over the base under Louisiana's consent statute.

Of course, the answer to the argument of the dissenting judge, apart from Louisiana law as to the right of a landowner to the minerals within his land, lies in the undisputed fact that respondents were the sole owners of the minerals sought to be taxed at the time they were severed at points on the surface of the land comprising Barksdale Air Force Base.

POINT No. 3

This point is that jurisdiction to levy severance taxes was retroceded to Louisiana by Congress in the Buck Act (4 U.S.C. §§ 106-110) which provides that "no person shall be relieved from liability for any income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area." This act defines "income tax" as meaning "any tax levied, or with respect to, or measured by, net income, gross income, or gross receipts."

Howard v. Commissioners of Louisville, 344 U.S. 624, 97 L ed 617 (1953), is relied upon exclusively as authority for petitioner's argument. In that case the tax was measured "by one percentum of (a) all salaries, wages, commissions, and other compensation earned * * *; and (b) the net profits of all businesses, professions or occupations from activities * * *." Clearly, there is no similarity between that tax and the tax here involved, which is measured upon the quantity of oil and gas severed and in no way falls within the definition of "income tax" in the Buck Act.

The opinion of the Court of Appeals concisely disposes of this point, and its logic can hardly be disputed.

CONCLUSION

Since Louisiana has ceded exclusive jurisdiction to the United States over Barksdale Air Force Base, Louisiana has no jurisdiction to levy taxes in the area with-

out the consent of Congress. Ownership of the property sought to be taxed is immaterial. Accordingly, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Shreveport, Louisiana, this 21st day of March, 1968.

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Of Counsel for Respondents

APPENDIX A

In the United States Court of Appeals
for the Fifth Circuit

No. 23,402

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
APPELLANTS

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE,
STATE OF LOUISIANA, APPELLEE

Appeal from the United States District Court for the
Eastern District of Louisiana

MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF THE UNITED STATES

Louisiana has levied a severance tax upon the oil and gas lessee because of the extraction of oil and gas within Barksdale Air Force Base. The United States has no direct financial interest in these taxes. But the United States is vitally concerned with preservation of the federal jurisdiction over the base and with a proper application of the law relating to such jurisdiction. For that reason, it appeared as *amicus curiae* in *Humble Pipe Line Co. v.*

Waggonner, 376 U.S. 369 (1964). For the same reasons, it has a direct interest in the instant case.

The United States is not concerned with the procedural question as to federal jurisdiction over this case. Moreover, in view of the extensive briefs already filed, we shall not repeat at length arguments already made.

ARGUMENT

Louisiana' Severance Tax Cannot Be Validly Applied to the Extraction of Oil and Gas From Beneath Barksdale Air Force Base.

A. *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964), *is controlling.* — Humble holds invalid the attempted imposition of personal property taxes upon privately owned property on Barksdale Air Force Base. The ground was that, since Louisiana had ceded exclusive jurisdiction to the United States, Louisiana had no legislative jurisdiction over the area. Necessarily, the lack of jurisdiction applies to the attempted taxation of the severance of the minerals within the area, as well as it does to the personal property used in such severance and transportation thereof to the market. *Humble* has plainly overruled *Mississippi River Fuel Corporation v. Fontenot*, 234 F.2d 898 (C.A. 5, 1956), cert. den., 352 U.S. 916. As in the case reversed in *Humble*, the *Fontenot* case confused the question of immunity of the United States and its instrumentalities from taxation and the entirely separate fact of lack of legislative jurisdiction of Louisiana to anyone within the enclave. In footnote 1 of *Humble*, the Supreme Court pointed out:

> No issue concerning immunity of federal instrumentalities from state taxation, apart from the question of lack of state jurisdiction to tax within a federal enclave, has been raised here.

The *Fontenot* case also relied upon the fact that the oil and gas leases required the lessee to pay taxes lawfully assessed. *Humble* expressly holds that this was not a waiver of exclusive federal jurisdiction.

The fact that here a severance tax, rather than a personal property tax, is involved, presents, if anything, a stronger case for lack of Louisiana jurisdiction than in *Humble*. This is so because the United States never had any connection with the personal property in the *Humble* case, whereas here the tax is on the severance of mineral from land owned in fee simple by the United States.[1] The reasoning advanced by the district court, and relied upon by appellee (Br. 42-43), if valid, would equally apply to personal property not owned by the United States. *Humble* clearly shows the error of this reasoning.

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(1) *Humble* held that the United States had acquired fee simple title to the entire tract A fee simple title "is the most extensive interest which one may possess in landed property, an absolute estate in perpetuity." *United States v. Sunset Cemetery Co.*, 132 F.2d 163, 165 (C.A. 7, 1942). Thus, regardless of theories of ownership of oil and gas prior to extraction, the United States owned all rights on land composing Barksdale Air Force Base. There is no room for implying a reservation by Louisiana of rights to any part thereof, above or below ground. We do not understand appellee to deny that the United States possessed exclusive right to extract the mineral itself or to assign that right to others. It is hard to see on what basis Louisiana can tax the privilege of extraction of the oil and gas — a privilege, the exercise of which Louisiana cannot control in an exclusive jurisdiction area.

Besides *Fontenot*, appellee is relying on the same line of cases that were urged unsuccessfully in *Humble* (see Br. 37-42). Humble makes it clear that *Paul v. United States*, 371 U.S. 245 (1963), which it cites for another point, does not authorize application of state tax statutes within areas of federal jurisdiction.(2) As the language quoted by appellee (Br. 38) from *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940), shows, that case was dealing with resolution of problems of the rights of occupants of area ceded, not with the power to tax. Carried to the logical extreme urged by appellee, the cession of jurisdiction would be meaningless until Congress took specific action. Clearly, that has never been the case.

B. *Jursdiction to levy a state severance tax was not retroceded by the Buck Act.*—The Buck Act, 4 U.S.C. secs. 105-110, waived immunity from state "sales or use" taxes and "income" taxes imposed on persons or transactions within federal enclaves. Appellee places no reliance on the sales or use tax portion of the Buck Act. And rightly so, since it is insisted that the Louisiana Severance Tax is a privilege tax on the severance of the minerals, not a sales or use tax. Clearly, it is likewise not a tax on net income, gross income or gross receipts within the definition of the Buck Act. The income tax section applies to persons residing within the enclave "or receiving

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(2) The Submerged Land Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. sec. 1333(a)(2), cited by appellee (Br. 39-40), relates to the special problems of the marginal sea and has no bearing on the effect of cessions by states of exclusive jurisdiction to the United States of areas within their boundaries.

income from transactions or services performed in such area." The severance is certainly not the performance of a service. Nor can it be called income from "transactions * * *" within the enclave. The severance is not a transaction producing income. That occurs later when the minerals produced may be sold or used.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed.

Respectfully,

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DECEMBER 1966.

APPENDIX B

Louisiana Revised Statutes of 1950, Title 47

Section 631:

"Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine."

Section 632

"These taxes shall be paid by the owner or proportionately by the owners thereof at the time of the severance and become due and exigible monthly, as herein provided; . . . ."

Section 634:

"The following terms as used in this Part shall have the following meanings ascribed to them:

"(1) 'Owner' means owner at the time of servance.

"(2) . . . .

"(3) 'Severed' means the point at which the natural resources are severed from the surface of the earth or water."